SEARCH AND SEIZURE IN NIGERIAN LAW
WITH PARTICULAR REFERENCE TO THE NORTHERN STATES

By

ALHAJI AHMED Abdullahi

A THESIS SUBMITTED TO THE POST-GRADUATE SCHOOL,
AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LL.M.)

Department of Public LAW
Faculty of Law
Ahmadu Bello University, Zaria.

DATE: DECEMBER, 1985

This effort is dedicated to my father Hon. Justice Ahmadu Abba Yola, all members of his family, my wife Fadima, and my three children Zainab, Mubarak and A'isha.

DECLARATION

This thesis has been prepared solely by me while registered as a candidate for the Degree of Master of Laws at the Ahmadu Bello University, Zaria, Nigeria. Everything taken from other authors for preparing this thesis has been duly acknowledged.

Bukar Shani .....
ALHAJI AHMED - Abdullahi
B. M. SHANI (Candidate)
(Supervisor)

..... 25-2-88
(Dean, Postgraduate School)

ACKNOWLEDGEMENTS

In the preparation of this thesis I have been assisted in various ways by a number of people. I would have loved to mention all of them by name. But constraints of space forced me to be selective. My very special thanks go to my learned supervisors, namely, Alhaji Baba M. Shani, Head of the Department of Public Law, Ahmadu Bello University, and Mr. Arshad Masood, Reader in the Department of Private Law, Ahmadu Bello University, from whom I received wise counsel, guidance and understanding, and who undertook the onerous task of reading through the manuscript and making many valuable suggestions. I do not find words to adequately thank them for the co-operation they sincerely extended to me throughout.

I am also grateful to Miss Esther Idoko, a student - lawyer possessing a keen interest in this area of the law who voluntarily collected some interesting material for me.

My most sincere thanks are due to Mallam Mohammed Inuwa Mo-Allahyidi whose words of encouragement sustained my morale at every stage of this task.

I am deeply indebted to my wife Fadimatu, and my children Zainab, Mubarak and A'isha for the forbearance and understanding they showed during the preparation of this thesis.

Mallam Haruna M. Yusuf deserves a lot of thanks for typing the thesis with dedication and speed.

ATTORNEY-GENERAL'S CHAMBERS,
MINISTRY OF JUSTICE,
YOLA, GONGOLA STATE.

ALHAJI AHMED Abdullahi

ABSTRACT

The centrepiece of this thesis is the study of the Nigerian law or. search and seizure with special reference to the Criminal Procedure code.

BasicalTv, search and seizure,is a process employed to recover either from the "body of a person or from a premises, material needed for the purpose of law enforcement. Hence, the police tan make use of the process to recover criminal evidence, in the course; of their investigation or, where necessary, in order to forestall the commission of crime,. Bv employing the process of search and seizure, therefore, the police may, for example, recover a hidden weapon from the body of a suspect or retrieve stolen property from the place or premises where such property is kept.

Let me hasten to state at this point that although the law in Nigeria empowers law enforcement agents to conduct search and seizure in the performance of their respective functions, this power is not absolute. The provisions of the Criminal Procedure Code and the Criminal Procedure Act relating to search and seizure provide the legal framework for the exercise of this power.

As a background to my treatment of this subject, it is deemed appropriate, as a first step, to undertake a survey of the development of English common law principles on search and. seizure. This is because of the close historical connection between the common law and Nigerian law as well as the pursuasive nature of English court decisions in Nigeria.

This thesis is divided into six chapters.

Chapter one i.-e., the introductory chapter, identifies the main probelm connected with the, exercise of the power of search and seizure which the law strives to eliminate or control. And that concerns the balancing of the private and public interests involved in search and seizure in such a way as to ensure the protection of citizens in their pri-vacv without prejudicing the process of effective law enforce-ment in any way.

Chapter two discusses the common law position on the subject with special reference to England and the United States, In doing so, the chapter critically examines the applicable common law principles in this area, the circums-tances when search is allowed, and the limits of seizure. It may be noted here that, subject to some exceptions. ,the orthodox common law view'is that search is allowed only when (i) it is conducted with the consent of the person to be searched, or (ii) it follows a lawful arrest, or (iii) it is conducted on the authority of a search warrant. Some of the exceptions to this common law position include (i) the frisking of suspects (ii) search, in emergency situations, and (iii) cases of items taken in plain view.

Chapter three is devoted to the study of the Nifrnrian law on search and seizure. Against the "background of the provisions of the Criminal Procedure Code and the Criminal Procedure Act, this chapter considers when search of a

person or place can "be made with or without warrant, what property may "he seized, and the powe^ of retention of the seized property. It further considers the procedural requirements for the issue and execution of search warrants. Finally, as a means of securing the liberty of persons wrongfully or unlawfully detained, the chapter contains a "brief comparison "between n search warrant issued for that purpose under section 77 of the Criminal Procedure Code and the habeas corpus procedure.

Chapter four focuses on the question of admissibility of evidence obtained bv illegal search nnd seizure. It "begins "by defining an "illegal" search "before proceeding to treat the admissibility aspect. Here, the Nigerian position is considered in line with other common law jurisdictions, such as, India, England and the United States.

The question of what remedies are available to a victim of unlawful search and seizure is considered in chapter five. The chapter discusses "both the preventive options open to an intended victim and the remedial options available to an actual victim. For instance, while the intended victim may exercise a right of resistance or petition the courts for an injunction, an actual victim may "bring an action to recover damages for trespass, assault or "battery, or petition the courts for restoration of the items seized.

Chapter six is the concluding chapter. It highlights the shortcomings of the law in its present form and the problems associated with its application. It concluded by recommending the implementation of some specified measures with a view to attaining an overall improvement in the situation.

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ABBREVIATIONS

ALL.E.R.	=	All England Reports
A.I.R.	=	All India Reporter
ALL. N.L.R.	=	All Nigerian Law Reports
A.C.	=	Appeal Cases
Ch.	=	Chancery Reports
Cr. App. R.	=	Criminal Law Reports
Crim. L. R.	=	Criminal Law Review
F.S.C.	=	Federal Supreme Court
H.L.	=	House of Lords
K.B.	=	King's Bench
L.Q.R.	=	Law Quarterly Review
L.R. Ir.	=	Irish Law Review
M.L.R.	=	Modern Law Review
N.L.R.	=	Nigeria Law Reports
N.M.L.R.	=	Nigeria Monthly Law Reports
N.N.L.R.	=	Northern Nigeria Law Reports
N.R.N.L.R.	=	Northern Region of Nigeria Law Reports
N.Z.L.R.	=	New Zealand Law Reports
Q.B.	=	Queen's Bench
S. Ct.	=	Supreme Court of the United States
T.L.R.	=	Times Law Reports
W.A.C.A.	=	West African Court of Appeal
W.L.R.	=	Weekly Law Reports
W.R.Cr.	=	Weekly Reports Criminal
W.N.L.R.	=	Western Nigeria Law Reports

CHAPTER I

INTRODUCTION

The subject of search and seizure deals with the circumstances in which either the person or the property of an individual may be invaded against his will in order to look for and take therefrom material for some purposes connected with law enforcement. The power of search and seizure has been conferred by law on its own agents, such as police officers, customs officers, prison officers and others to facilitate the performance of their official functions in the area of crime detection, prevention and investigation.

On the other hand, like the constitutions of many other democratic states, the constitution of the Federal Republic of Nigeria, 1979, guarantees to all Nigerians the inviolability of personal freedoms and privacy of life.[1]

This being so, the power of search and seizure seems to directly impinge upon these constitutionally guaranteed freedoms. How do we then reconcile the power of search and seizure which is a necessary element in the protection of the interest of society against crime and lawlessness, and the freedom from encroachment upon private lives and property so essential for the mental peace and intellectual development of citizens?

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1. For instance, Section 34 provides that "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications, is hereby guaranteed and protected."

This is the crucial question to which an answer has to be found if societal interests are to be protected without damaging the individual interests. In its quest for such an acceptable equillibrium the legislature has tried to specify the circumstances when a search can lawfully be made, the procedure that has to be observed for this purpose, the property that may be seized, and other related matters. And the judiciary has, for its part, propounded some principles to prevent the abuse of the power of search and seizure given by the legislature to agents of law. For example, the judiciary has ruled against a general search (i.e., a search not in respect of specific documents or things but a roving expedition for the purpose of discovering some thing which might be used to incriminate a person) and declared that where a search is authorized by a warrant, the warrant must specify the place or places to be searched and the article to be taken.[2]

In order to ensure compliance with the legislative and judicial norms, the law invariably recognizes the right of a victim of a wrongful search to seek redress in civil courts by way of an action for trespass.

In one of the oldest and most famous English cases on the subject of search and seizure, namely Entick v. Carrington,[3] Pratt, L.J., said, "... No man can set his foot upon

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2. The cases of Crozier v. Cundy, (1827) 6 B & C. 232 and Pringle v. Bremner (1867) 5 Macpherson 55 (H.L.) discuss the power of seizure under a warrant. See infra, n. 19 and n. 21 respectively for a discussion of the two cases.

3. 19 St. Tr. 1092, For a discussion of this case see at no. 16 infra.

his neighbour's close without his leave; if he does, he is a trespasser though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law..."

Also in a recent case,[4] Lord Denning, M.R., emphasizing the need for the observance of the correct procedure when conducting a search, declared:

> ....It is fundamental in (our)law that the means which are adopted to this end should be lawful means. A good and does not justify a bad means. The means must not be such as to offend against the personal freedom and the privacy of individuals, and the elemental rights of property.... If his house is to be searched and his property seized on suspicion of an offence, it must be done by due process of law.

The Nigerian law on search and seizure is contained in the Criminal Procedure Code, 1960, applicable to the ten Northern States, and the Criminal Procedure Act, 1945, applicable to the nine Southern States.

It is noteworthy that despite the fact that the Criminal Procedure Code and the Criminal Procedure Act are two different statutes, the substance of the law as contained in them is very much similar.

This thesis is devoted to the study of the law of search and seizure in Nigeria with particular reference to the legal position as it prevails in the ten Northern States.

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4. Rossminster Case, (1979) 3 All E.R. 385, C.A. For the facts of the case, see n. 17, infra; Also see Lord Denning, (1980), The Due Process of Law, 122.

CHAPTER II

SEARCH AND SEIZURE AT COMMON LAW

Under the English Common Law, the police have no general power to compel people to submit to a search of their persons, possessions, or premises. Therefore, in order to be valid, the search by the police in England must be made either with the consent of the person affected or in the course of a lawful arrest of an offender with or without warrant, or under a search warrant issued by a competent court.[5] These principles and the exception to them are considered below:

I. POWER OF THE POLICE TO MAKE SEARCH AND SEIZURE

A. SEARCH WITH CONSENT

Where someone genuinely consents to a search by the police of either his own person or his premises, he has no basis for complaining that the police acted unlawfully. Thus, for instance, where a police officer has information that a crime has been committed in a particular premises he may, without obtaining a search warrant, seek the permission of the occupier to enter and search the premises for the evidence of the crime. In fact, English police seldom use search warrants because permission to enter premises is usually granted.

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5. See generally Fitzgerald, (1962), Criminal Law and Punishment, 176 - 178.

It is sometimes possible that in such a situation consent may be induced either by a fear of the police in general or a fear that they will search anyway. Until 1963, the common law in England provided no effective remedy in in such situations. However, in that year the court of Criminal Appeal in the case of R v. Payne[6] quashed the conviction for drunken driving of a man who had agreed to be examined by a doctor to establish whether his condition was due to illness or due to drunkenness. The Court felt that his consent was not freely given but was induced by fear.

B. SEARCH AND SEIZURE UPON LAWFUL ARREST

A lawful arrest may be made outside a premises whether with or without a warrant. And, so long as the arrest is valid the police are empowered to search the person of the individual arrested.[7] Such a right is reasonable and necessary in order to recover things which may be used as evidence at the trial and to protect the police as well as the prisoner against the possibility of the use of weapon or poison concealed on the latter's person.

But the question is whether the search in such cases can be extended to the vicinity of the arrested person as well. This point has not been decisively settled so far by the common law in England. The general assumption,

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6. (1963) 1 WLR 637. For a fuller discussion of this case, see at no. 118 infra.

7. The existence of such a power was affirmed by Lord Campbell, C.J., in Bessel v. Wilson, E.B. 489 at 492 /note 20 L.T. (O.S.)/

however, is that the police may, in addition to the search of the body of the arrested person, also search the vicinity of the arrest.[8]

Again, a lawful arrest may also be made inside a premises either with or without a warrant. Thus, a police officer engaged in hot pursuit of a fleeing criminal may pursue that criminal into a private premises without being armed with a warrant. In fact, the law allows such an officer to use reasonable force in order to gain access into the premises for the purpose of affecting the arrest.[9]

Also, a police officer who is armed with an arrest warrant can lawfully enter into a private premises for the purpose of executing the warrant. Such an officer is equally allowed to use reasonable force to gain entry into the premises where there is resistance.

An interesting question may arise as to whether the police have power to search the premises where the arrest of the offender has been made in addition to the search of the person of the said offender.

The traditional Common Law position here is that the police may search the premises of the arrest only if such premises is in the occupation of the person arrested, but the police have no right to search the premises not in the

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8. Karlen, (1967) Anglo-American Criminal Justice, 130.

9. Smith v. Shirley (1846) 3 C.B. 142; 10 Halsbury, Laws of England, 354.

occupation of a person arrested merely for the reason that he happens to be on the premises at the time of his arrest. However, as a matter of practice the English police search the whole of a house in which a person is arrested on the theory that such search is incidental to arrest.[10]

This practice has generated a lot of controversy because it constitutes a negation of the common law position on the issue. But the controversy was finally settled in 1929 when the Royal Commission on Police Powers and Procedure declared certain previous police practices to be part of the common law on the ground that they had received the "tacit approval of the courts."[11] These included (i) the search of the dwelling house of a person for whose arrest a warrant has been issued; and (ii) in cases of arrest without warrant, the search of the premises of the arrest as well as the arrested persons; (iii) in cases of serious crime, any place where it seems likely that any material evidence can be obtained.

It may, however, be submitted that the report of the Commission (which only represented the views of the Home Office) could not, in principle, be regarded as a declaration of the common law since it is universally accepted that

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10. Wade, "Police Search," Law Quarterly Review, (1934) Vol. 50, 362 - 363.

11. Id. at 365 - 366.

common law principles evolved through the decisions of English courts and not through declarations made by other bodies. The correct view of the law, it is respectfully submitted, was expressed by Camden C.J. in Entick v. Carrington[12] when he said:

> If he(the defendant) admits the fact (of trespass), he is bound to show by way of justification that some positive law has empowered or excused him. The justification is submitted to the Judges, who are to look into the books and see if such a justification can be maintained by the text of the Statute Law or by the principles of the Common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant.

The substance of the above quotation is that the conduct of a searcher must be justified by reference to a statute or to the principles of common law, otherwise it is a trespass.

The main purpose of conducting a search is to look for and secure tangible evidence for the prosecution. It is, therefore, necessary to determine the types of property or object that can be taken following a search after arrest, whether inside or outside a premises, and to define the limits of the power of the police to seize property.

According to older cases,[13] the power of seizure upon arrest is limited to items in the possession or control of the prisoner which may be evidence against him, or any

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12. Supra, n. 3 at 1066.

13. E.g., Leigh v. Jole (1853) 6 Cox C.C. 329.

weapon in his possession at the time of the arrest, or anything which may aid him to escape. This position is in accordance with existing English police practice of taking upon arrest only such articles as are found in the possession or control of the person arrested which are or which might be material evidence on a charge against him.

But a different view has also gained ground. It is that the police may take from the arrested person not only those items which may constitute evidence for the offence for which he is arrested, but also those items which may provide evidence "of any other serious offence which they (the police) reasonably believe he has committed."[14]

However, it is noteworthy that the Irish courts have long established the rule that the police are entitled, upon lawfully arresting a person accused of committing a crime, to take and detain property which would form material evidence on his prosecution for that crime.[15]

C. SEARCH AND SEIZURE UNDER WARRANT

The English common law gives power to courts to issue warrants only for the search of stolen goods or the evidence of theft but statutes have extended the power to search such things as dangerous weapons or obscene articles.

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14. See Celia Hampton (1977) Criminal Procedure, 27.

15. Dillon v. O'Brien, (1887) 20 L.R. Ir. 300. Also see Thomas, "The Law of Search and Seizure," (1967), Criminal Law Review, 2 - 6.

In relation to search warrants, the following points should be noted.

(i) The practice of issuing a general search warrant for the purpose of procuring evidence of crime against suspected persons was declared illegal and void at common law in 1765 in the case of Entick v. Carrington.[16] This case condemned the long - standing practice of the Secretary of State issuing a warrant authorizing: (a) the arrest and production before him of a person suspected of being involved in the commission of a crime; and (b) an unrestricted search of the property of such person with a view to taking therefrom any material connected with the offence.

In that case, it was alleged by the defendants that the plaintiff had published and was in possession of certain seditions material. Thereupon, the Secretary of State issued a warrant authorizing his arresting the seizure of all his papers and books with a view to discovering the seditious publication. In execution of the warrant, the defendants entered the premises of the plaintiff and thoroughly searched it for a duration of four hours. In the course of the search, they ransacked the whole premises, broke open the locks to various doors, boxes, chests and drawers; they read over, probed into,

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16. Supra, n. 3.

and examined all the private papers and books of the plaintiff. And, though they failed to find what they searched for, they made away with several hundred pamphlets.

The plaintiff sued the defendants in trespass. The defendants, pleaded justification for their action on the basis of the prevailing practice at the time. It was held that because no principle of the common law was cited by the defendants in support of the practice of the Secretary of State issuing such general warrants, the warrant under which they had acted was wholly illegal and void and the defendants were liable in trespass. In the words of Pratt L.J: "To enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the Spanish Inquisition .... it was a most daring public attack made upon the liberty of the subject." Lord Camden also declared that the conduct of a searcher must be justified or excused either by the provisions of a statute or the principles of common law, otherwise he is a trespasser.

(ii) The warrant must also specify the offence in relation to which the warrant is issued. This requirement was laid down by the English Court of Appeal in 1979 in the celebrated case of Rossminster.[17] In that case the British Parliament had conferred wide powers of

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17. Supra, n. 4.

search under the Finance Act of 1976 on the officers of the Inland Revenue so as to enable them to procure material evidence from tax evaders and to uncover frauds against tax. Upon suspicion that the Rossminster Group of Companies and those connected with the Group had been perpetrating frauds on a large scale, the Revenue authorities obtained search warrants to search the offices of the Group and the private residences of individuals connected with them. As a result, simultaneous searches were conducted at the various targets on a particular day and thousands of all sorts of papers, files and documents seized.

One of the victims challenged the validity of the warrant issued against him on the ground that it did not specify the nature of the offence he was suspected to have committed and that it was impossible to know the type of fraud involved.

Denning, L.J., observing that the statute in question must be construed in such a way as to protect the liberty of the individual, held that the warrant was illegal. He declared that every warrant must particularise the specific offence which is considered to be a fraud on the tax and that the warrant in question was bad for its failure to specify the offence alleged to have been committed.

(iii) On the question of what property may be taken pursuant to a search warrant, it was once held that any property which forms evidence of the offence in respect of which entry upon a premises is made under a warrant may be taken therefrom.[18] However, judicial decisions since 1827 seem to have ignored this limitation.

Thus, in Crozier v. Cundy,[19] the police had obtained a warrant to search the plaintiff's house for certain specific goods alleged to have been stolen. But after the search, they took away other goods of the plaintiff not mentioned in the warrant and not likely to be of use in substantiating the charge of stealing the goods so mentioned. Holding the police liable in trespass, Abbott C.J. said: "If those others had been likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant, there might have been reasonable ground for seizing them, although not specified in the warrant...." But His Lordship hastened to add: "I have expressed myself in this manner in order to prevent the supposition that a constable seizing articles not mentioned in the warrant under which he acts is necessarily a trespasser."[20]

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18. E.g., Six Carpenter's Case (1610) Co. Rep. 146
19. Supra, n. 2
20. Id. at 233.

This decision established that in addition to the articles which are evidence of the offence and which are mentioned in the warrant, other articles which are likely to furnish evidence of the identity of the stolen goods may also be taken although they are not mentioned in the warrant.

Furthermore, it would seem that a lawful entry under a search warrant empowers the police to take any material which is evidence of any other offence under police investigation in which the accused is implicated. For instance, in Pringle v. Bremner,[21] a warrant was issued for the searhh of the pursuer's premises for pieces of wood and fuses used in exploding the bush of a cart-wheel outside the manse of a church minister whose recent arrival had roused a storm of protest. In the course of the search, the police discovered certain papers which the minister had received and which seemed to implicate the pursuer in the offence relating to these letters which was under investigation. The police took away the papers and arrested and detained the pursuer for a short while. He brought an action against the police for illegal search and seizure of the papers not mentioned in the warrant.

In dismissing the action, the Court held that, in the circumstances of the case, the defendants were justified in taking possession of the papers which they found implying

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21.Supra, n. 2.

the appellant's complicity in the offence which was under investigation.

II. MODERN DEVELOPMENTS

We may at this stage examine some modern developments in the common law. In order to put our analysis in proper context, we may briefly restate the undisputed and well established principles of the common law as they obtained before 1929 when the Royal Commission on Police Powers and Procedure submitted its Report.

First, a general search warrant is illegal and void; secondly, for a search to be lawful, it must either be with consent or incidental to arrest or follow a lawful entry into premises; thirdly, after the arrest of a person the police can search him and the premises occupied by him and take such property in his possession or control as forms evidence of the offence for which he is arrested; fourthly, if the search is authorized under a warrant, the police may take property which may be evidence of the offence for which the prisoner is charged as well as the property which may be evidence of any other offence under investigation in which the prisoner is implicated; and fifthly, an unauthorized search of either the person of an individual or the premises constitutes a trespass on the person or premises, as the case may be.

However, certain developments in the law of search and seizure in the post-1929 era have not been in line with the foregoing principles of the common law.

For instance, in the case of Elias v. Pasmore & Others,[22] which arose barely five years after the Report, H was arrested under a warrant at the premises of his employers, the N.U.W.M. Company. The police seized a number of books and other documents found by them on the premises at the time of making the arrest. Some of them were not even the property of H or proved to be in his possession or control, and none of them was or could have been used in evidence at the trial of H.

One of the documents seized was used at the subsequent trial of one Elias, another official of the N.U.W.M. Company. Most of the documents were returned by the police; but some of them were detained expressly in connection with the prosecution of Elias, and yet others were detained for possible use in "any other proceedings of an analogues character which may be instituted."

In these circumstances, the Company brought an action against the police claiming damages for alleged trespass to the premises and for conversion and detinue of their books and other documents. The Company contended that

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22. (1934) 2 K. B. 164.

the search and seizure were illegal since the police were not in possession of a valid warrant for the search of the premises but that they conducted the search only after arresting H on a warrant for his arrest.

The police, basing their own defence on the common law, contended that the seizure was quite lawful for the reason that the entry on the premises was for a lawful purpose and the documents were taken by them in connexion with the arrest of H; and that some of the documents were detained for being used as evidence in criminal proceedings against Elias and proceedings likely to be instituted against others.

Horridge, J. took the view that "the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appeared in fact that such documents were evidence of a crime committed by anyone."[23] He, therefore, held (i) that the original seizure, even though improper at the time, would be excused; (ii) that the documents used at the trial of Elias were properly seized because they were capable of being and were in fact used as evidence in the trial; (iii) that trespass was committed only in respect of those documents which were not used in evidence at all.

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23. Id. at 200

Two important points have to be noted about this decision. First, in excusing the seizure of "evidence of a crime committed by anyone," it extended the common law rule laid down in 1887[24] that upon arrest of a person seizure can be made only of things which are evidence of the crime for which the arrest is made or which are evidence of facts implicating the accused in a different crime which the police are investigating. While propounding the extension, Horridge, J. had candidly admitted that no direct authority in English law was cited to him in its support.

Secondly, in holding the seizure of the documents at the time of the arrest of H to be proper for the reason that they could be used as evidence in the trial of Elias, the case clearly departed from the rule established in 1765 by the decision in Entick v. Carrington[25] that there is no general right of search or seizure at common law. The criticism here is that the learned Judge permitted the police to use the warrant for the arrest of H to find evidence against Elias, a total stranger to the crime mentioned in the warrant.

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24. Dillon v. O'Brien, supra, n. 15

25. Supra, n. 3.

Thirdly, the case also established for the first time, apart from the 1929 Report of the Royal Commission on Police Powers and Procedure, that the police can search the premises of arrest even if that premises is not shown to be in the occupation of the person arrested. Before then, the common law did not allow the search of a particular premises to be justified merely on the ground that the person to be arrested was found on such premises. It required that the person to be arrested must be the occupier of the premises to make the search of premises valid.

The cloud of obscurity which descended on the common law as a result of Elias v. Pasmore & Others[26] was not fully lifted even by the later decisions in the cases of Chic Fashions (West Wales) Limited v. Jones,[27] Ghani v. Jones[28] and Garfinkel & Others v. The Metropolitan Police Commissioner.[29]

In Chic Fashion's case,[30] a factory at Leicester, known as Ian Peters Limited, was broken into and ladies' garments were stolen therefrom. A few weeks later, some of the stolen garments were being offered for sale at less than trade prices at the shops of Chic Fashions in

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26. Supra, n. 22.
27. (1968)2 Q.B. 299
28. (1970)1 Q.B. 693.
29. The Times, September, 4, 1971
30. Supra, n. 27.

Cardiff. The police suspected that the stolen goods from Leicester had found their way into the shops at Cardiff. Therefore, they decided to search all these shops as well as the house of the director. They obtained search warrants and conducted the searches. But they failed to ffind any stolen garments of 'Ian Peters' make. Instead, they found stolen garments of other makes. These garments were seized. However, the director of the shop gave a satisfactory explanation about the garments whereupon they were returned by the police. Chic Fashions sued the police for damages. The trial court decreed the suit for £500. The police appealed against the decision.

Allowing the appeal, the Court of Appeal held that when a police officer enters some premises by virtue of a search warrant for stolen goods he may seize not only the goods which he reasonably believes to be covered by the warrant but also any other goods which he reasonably believes to have been stolen and to be material evidence on a charge of stealing or receiving stolen property against the person in possession of them or anyone associated with him. It further declared that the lawfulness of the police officer's conduct must be judged by the position as it prevails at the time of search and not by what happens afterwards.

The decision clearly provides an exception to the common law principle established in 1610[31] that the seizure of goods other than those mentioned in the warrant is a trespass both on the goods as well as on the land and renders the searcher a trespasser ab initio. It also modifies Elias v. Pasmore & Others [32] to the extent that it excuses even an improper seizure of articles if what was seized subsequently turns out to be evidence on a charge against anyone.

In Ghani's case,[33] a Pakistani family was living in Oxford for a number of years. The wife having disappeared the husband went back to Pakistan. The Police thought that he had murdered her. In the course of their investigation, the police went to the house, searched it, and took away the passports of the mother, father and sister of the husband who were still in the house. The police continued their inquiries still believing, on reasonable grounds, that the husband had murdered his wife. The three persons whose passports were taken away by the police requested the return of their passports saying that they wanted to go back to Pakistan for a holiday. The police refused to surrender the passports to them

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31. Six Carpenter's case supra, n. 18

32. Supra, n. 21.

33. Supra, n. 28.

on the ground that they believed the passports to be of "evidential value" on a prosecution for murder. Consequently, the three brought an action against the police for the recovery of their passports.

Lord Denning, M.R. considered the power of the police at common law to enter and search private premises when no man has been arrested or charged. His Lordship formulated the following criteria for the exercise of such power:

(1) The police officers must have reasonable grounds for believing that a serious offence has been committed - so serious that it is of the first importance that the offenders should be caught and brought to justice;

(2) That the police officers must have reasonable grounds for believing that the article in question is either the fruit (as in the case of stolen goods), or is the instrument by which the crime was committed (as in the case of an axe used by the murderer), or is material evidence to prove the commission of the crime (as in the case of the car used by a bank-raider);

(3 The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or that his refusal must at any rate be quite unreasonable;

(4) The police must not keep the article or prevent its removal for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. And, as soon as the case is over, or the police decided not to go on with it, the article should be returned; and

(5) The lawfulness of the conduct of the police must be judged at the time and not by what happens afterwards.

On the basis of the above criteria, it was held that the police were not entitled to retain the passports because although the first condition was satisfied, neither was the second nor the third.

In Garfinkel's case,[34] a search warrant was issued under the Explosive Substances Acts authorizing the police to enter the plaintiff's premises and to take samples of any explosive, ingredient of any explosive, or any substance reasonably believed to be an explosive or its ingredient. No such substances were in fact found. However, the police did find and seized a large number of documents which were evidence of other crimes, such as, conspiracy to pervert the course of justice or to commit contempt of court.

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34. Supra, n. 29.

Ackner, J., relying on Ghani v. Jones,[35] upheld the seizure of the documents.

He stated that:

> The law was that where the police entered a man's house by virtue of a warrant, and in the course of their search found any goods which showed him to be implicated in some crime other than that to which the warrant was directed, they might have them provided they acted reasonably and detained them no longer than is necessary.

Thus, while Elias v. Pasmore & Others,[36] authorises the taking, upon lawful entry into premises, of property which is evidence of a crime committed by anyone, this case lays down that in such circumstances the property to be taken must be related to the offender or the offence whose mention on the warrant had made the warrant lawful; in other words, it reaffirms the holding of Pringle vs. Bremner[37] on the point.

The combined effect of Chic Fashions[38] and Ghani's[39] case is:

(i) That if private premises are searched in pursuance of a search warrant, a police officer may seize any goods which he reasonably believes to be evidence of any crime committed by the occupier; and

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35. Supra, n. 28
36. Supra, n. 24
37. Supra, n. 2
38. Supra, n. 27
39. Supra, n. 28

(ii) That in the absence of an arrest or search warrant a constable who has obtained access to private premises may seize any property which is evidence of a serious crime which he is investigating in relation to the occupier or anyone implicated with him in that crime.

The power to detain property so that it could serve as evidence of a crime was specifically considered in the case of R v. Waterfield & Another.[40] In this case, the defendants had smashed their car into a wall. Two policemen wished to keep the car as evidence of the defendant's dangerous driving. Therefore, they tried to prevent the defendants from driving it away. The driver, who had not been charged, drove the car at one of the policemen and then drove it away. Prosecution was launched against the defendants for assaulting a police officer acting in the discharge of his duty. The trial court convicted the defendants. An appeal was taken gagainst the conviction. The question was whether the police officer who tried to prevent a person from driving his car away when it could have afforded evidence of the commission of a crime was acting within the execution of his duty.

Holding that in the circumstances of the case the police had no duty to detain property found in a public place so that it could be used in evidence, the court answered the question in the negative and allowed the appeal.

The above survey of the principles of English common law on the subject of search and seizure shows that the developments in the law since 1929 to date have been so

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40. (1964) 1 Q.B. 164.

imprecise that it is not easy to state with certainty what the applicable principles are.

For example, the rule in Elias v. Pasmore & Others[41] which allows the seizure of articles which form evidence of a crime committed by "anyone" upon a lawful entry into a premises and the Report of the Royal Commission on Police and Procedure Powers/1929, which incorporated certain previous police practices into the common law, may be criticised as lacking the characteristic background of common law principles, namely, affirmation or pronouncement by English courts upholding both the rule and the practices in question as part of the body of English Common Law.

Similarly, the two later decisions[42] of the Court of Appeal are also open to criticism in as much as they too have rendered the law on search and seizure even more obscure than it formerly was.

However, as if in direct rejection of such criticisms, it has been said that "the common law is not static. It is a growing organism which continually adapts itself to meet the changing needs of the time. There has never been a time when the incidence of crime was higher or the need for prevention of crime greater than it is today."[43] But on balance it seems that these post 1929 developments have made it almost impossible to write on the subject with certainty.[44]

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41. Supra, n. 22.
42. See supra, n. 10 at 363.
43. Per Salmon L.J. in Chic Fashions Limited v. Jones,
44. "Recent Developments in the Law of Search and Seizure," (1970), vol.33, M.L.R., 268 et seq.

III. THE APPROACH IN SOME OTHER COUNTRIES

The American law on the subject largely follows the same pattern as English law. However, a close survey of the principles operating in the two jurisdictions would reveal that the law in the United States is in many instances more detailed and explicit than what obtains in England.[45] By way of illustration, the following areas may be considered.

(I) Search with Consent

As far as the search with the consent of the person affected is concerned, the principles applicable in the United States and England are very much similar. Therefore, search is valid in the United States provided that the following conditions are satisfied.

(i) The consent must be freely and voluntarily given. For instance, in Schneckloth v. Bustamonte[46] the High Court in the United States stated that a search by consent is valid when the consent is shown to be voluntary. Speaking for the majority in the case, Justice Steward remarked that voluntariness of consent is the key to a lawful search.

If, on the other hand, a police officer enters the defendant's property through trickery or fraud, any evidence secured therefrom is inadmissible. Where, however,

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45. Supra, n. 8 at 130.

46. 412 U.S. 218 (1973)

the defendant invites the police agent to his premises for the specific purpose of conducting an illegal commercial transaction, the agent is considered to be there with the defendant's consent or permission.[47]

(ii) The person who gives the permission to search must have the right to allow such a search. It has been held that an employer can permit the officers to search the premises used by an employee at the place of his employment;[48] a host can give consent to search the rooms of a guest unless the room(s) have been set aside for long term, exclusive use by the guest;[49] a co-occupant or co-user could consent to a search of the premises where he is the co-occupant or co-owner.[50] On the contrary, it has also been held that a landlord cannot give consent to the police to search a tenant's room.[51] Nor can a hotel manager allow the police to search a rented room.[52]

Even if the person giving the permission to search has no right to give it, the search may still be valid provided that the officers receiving the permission believe in good faith that the person does, in fact, have that

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47. Lewis v. United States 385 U.S. 206 (1966)
48. Friedman v. United States 381 F. 2d 155 (1967)
49. Burge v. United States 342 F. 2d 408 (1965)
50. Frazier v. Cupp 394 U.S. 731 (1969)
51. Chapman v. United States 365 U.S. 610 (1961)
52. Stoner v. California 376 U.S. 483 (1964)

authority to give such permission. If, therefore, a woman answers the door and states that she is the wife of the man who lives there, and then gives the investigators permission to search the apartment and later it turns out that she was not in fact his wife and, therefore, really did not have authority to allow such search, the search would be legal.[53] The theory here is that the officers did not knowingly, or with any wrongful intent, violate the rights of the owner of the premises. In England, the rule is that if evidence is relevant it is admissible even if it was obtained through unlawful means. This rule is however, subject to the exception that evidence obtained by a trick, or by false representations, or by the police acting oppressively is inadmissible.[54]

(2) Search and Seizure upon Lawful Arrest

Just as is the position under English Law, American Law, in appropriate cases, also authorizes the search of the body of a person or premises following a lawful arrest. This traditional exception to the warrant requirement of the Fourth Amendment to the United States Constitution has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrested individual by virtue of the lawful arrest. The

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53. Payton, (1974), Criminal Investigation and the Law, 251.

54. "The Right of Search," (1969), Journal of Criminal Law. Vol. 33, 48.

second is that a search may be made of the area within the control of the arrested person.

The justification for the search upon arrest is based on the need to discover evidence. This also was the apparent opinion expressed by the United States Supreme Court in Preston v. United States,[55] that a search incident to arrest is justified by the need to prevent the destruction of evidence and to control the use of weapons.

However, since the decision by the United States Supreme Court in Chimel v. California[56] in 1969, search upon arrest has been justified on the following four grounds:

(i) To protect the arresting officer;

(ii) To prevent the arrested person from attempting suicide;

(iii) To prevent the arrested person from escaping;

(iv) To prevent the destruction of evidence.

On the scope of search incident to arrest, it has been held in the United States that a search incident to arrest is restricted to the area of arrested person's immediate control, in addition to the search of the person of the individual arrested. In the Chimel case,[57] for example,

police officers armed with an arrest warrant (but no search warrant) were admitted to Chimel's house by xxxxxhis

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55. 367 U.S. 364 (1964)

56. 395 U.S. 752 (1969)

57. n. 56, above

wife. When Chimel arrived he was arrested. Although he denied a request by the officers to "look around," the officers proceeded to conduct a search of the entire house. At his trial for burglary, items taken during the search were introduced over his objection and admitted as evidence secured during a search incident to lawful arrest. He was convicted and the conviction was affirmed by the Supreme Court of California. He then petitioned the United States Supreme Court contending that the search was unreasonable and that it was executed in violation of his privacy as guaranteed by the Constitution of the United States.

Quashing the conviction, the U.S. Supreme Court declared that the search had gone far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him; that there was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area; and that the scope of the search was, therefore, unreasonable.

Chimel was a landmark decision in the history of searches without warrant in the United States in so far as it overruled the two earlier cases[58] and established

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58. Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz 339 U.S. 56 (1950)

very narrow restrictions on the scope of searches incidental to arrest. The Supreme Court laid down that the search must be limited to the immediate area of control of the person arrested. The phrase "immediate area of control" was generally defined as the area within which the person arrested may be able to reach for a weapon or destroy evidence.

In Harris case,[59] the police officers had obtained a warrant for the arrest of Harris on the basis of his alleged involvement in the cashing of a forged cheque. He was arrested in the living room of his apartment. And, in an attempt to recover two cancelled cheques thought to have been used in the forgery, the officers undertook a thorough search of the entire apartment. Inside a desk drawer they found a sealed envelope marked "George Harris, personal papers." The envelope, which was then torn open, was found to contain some documents which were used to secure Harris' conviction for a violation of the Selective Training and Service Act 1940. The search was sustained by the trial court as being "incident to arrest." His subsequent petition to the Supreme Court alleging that the search was unreasonable was also dismissed.

In Rabinowitz case,[60] there was an allegation that the defendant was dealing in stamps bearing forged over-prints.

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59. supra, n. 58

60. supra, n. 58

On the basis of the allegation, a warrant was issued for his arrest, which was executed at his one-room business office. At the time of the arrest, the officers searched the desk, safe, and file cabinets in the office for about an hour and a half and seized 573 stamps with forged overprints. The stamps were admitted into evidence at the defendant's trial and he was convicted.

Affirming his conviction, and rejecting his contention that the search was unlawful as being without warrant, the Supreme Court of the United States held that the entire search fell within the authority of the law enforcement agents to search the place where the arrest was made in order to find and seize things connected with the crime.

The New Zealand courts, unlike their English counterparts, restrict the police power of seizure upon lawful entry into premises to evidence relating only to the offence in respect of which the entry was lawful. In other words, the position in New Zealand is the same as the position in the United States. Thus, in Bernett & Grant v. Campbell,[61] a warrant for arrest and search, issued under the Gaming Act 1881, was directed specifically against "tables and instruments of gaming." The search revealed no such tables or instruments; but certain documents which formed evidence of a different gaming offence were found and seized. At no time were the persons in possession of the documents

61. (1901-02) 4 G.L.R. (N.Z.) 430.

arrested. The trial court held the seizure to be justified. On appeal, the New Zealand Court of Appeal declared, after a careful consideration of the English and Irish cases, that the seizure was invalid because the warrant had authorized the seizure of only the "tables and instruments of gaming," and nothing else could be seized under that warrant.

The decision was reaffirmed by the New Zealand Court of Appeal in the case of McFarlane v. Sharp.[62] In this case, a bank was robbed and McFarlane came under suspicion. The police obtained a warrant to search his premises and car in order to look for some of the apparatus which had been used by the robbers. The search of both the premises and the car revealed no evidence relating to the robbery. But, while searching McFarlane's premises, the police found and seized documents which were evidence that he had committed an offence relating to book-making. Two hours later, he was arrested for that offence at a police station where he had gone voluntarily for questioning. He, thereupon, instituted proceedings against the police in which he alleged, inter alia, that the seizure of the documents was unlawful. The defence, relying upon the recent trend of English law culminating in Ghani v. Jones,[63]

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62. (1972) NLR 838, Court of Appeal.

63. supra, n. 28

argued that the principles laid down by the English Court of Appeal were applicable in this case, so that the seizure of the documents was lawful. But the trial court declared that the seizure of the documents was unlawful because the law has not conferred upon the police the power to take possession of the documents first and arrest afterwards. This view was upheld by the New Zealand Court of Appeal.

Finally, it may be said that the streams of common law run purer these days in the United States and New Zealand which more strictly adhere to the common law rule that the seizure of a person's property is not justified except when in general it follows his arrest or when it is within the specified terms of a search warrant.[64]

IV. SEARCH IN SPECIAL CASES

As we have seen, the common law had from earliest times allowed the search of either the person of an individual or a premises to be made only with the consent of such individual or following upon such individual's lawful arrest or on the authority of a search warrant. However, certain American and English decisions have declared valid searches made in circumstances falling outside the three permissible areas mentioned.

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64. Bridge, (1984), "Search and Seizure" Criminal Law Review, 218 - 222.

These special cases of search may be considered below.

(i) Frisking a Suspect

Frisking is the patting down of the body of a suspect for weapons he is suspected to be carrying. The American law, out of its concern for the safety of law enforcement officers, provides that where a police officer has reason to believe, either from information given to him by another or upon his own observations, that a suspect whose conduct he is investigating is armed and is presently and imminently dangerous to the officer or to others, the officer may pat down the body of such suspect with a view to recovering such weapons. The patting down is restricted to the outer body of the suspect and only weapons can be taken from him after frisking. In other words, frisking is not meant for recovering things useful as evidence from the body of a suspect.[65] Terry v. Ohio[66] has prescribed that three conditions must be satisfied before a suspect is subjected to frisking. They are:

(i) There must be reasonable belief that the suspect is armed with a deadly or dangerous weapon; and

(ii) There must be the belief that if the suspect is not patted down or frisked harm will come to the officer or to another person.

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65. Remington, "The Law Relating to 'On the Street' Detention, Questioning and Frisking Suspected Persons". (1962) Police Power and Individual Freedom, 17 - 18.

66. (September, 1968) Journal of Criminal Law, Criminology and Police Science, vol.59, No.3, 33.

(iii) The belief of the officer must be based : either upon a combination of observations and experience, or upon legitimate prior information coming, for instance, from a reliable source.

In this case, an experienced officer on street duty observed two men acting very suspiciously in front of a jewelry store. From his many years of experience and his immediate observations, he became convinced that they were "casing" the jewelry store for an armed robbery. He stopped and questioned the suspects and this made him more convinced of his suspicions. So he patted down the outside of their clothing to see if they were carrying weapons. The frisk detected a metal object that felt like a gun, so he reached under the clothing and removed a gun, and then arrested the suspects for attempted robbery. The case was appealed on the grounds that the search was illegal as it violated the rights of privacy of the suspects.

The American Supreme Court dismissed the appeal and held that in criminally suspicious circumstances the police have the power to stop and search a person where there is a probability that he is armed and may be dangerous to the officer or other citizens.

In England, something comparable to the power of frisking seems to have taken shape in relation to private premises since 1970 when Ghani v. Jones[67] declared that such premises

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67. Supra, n. 28.

may be searched in the course of an investigation even though no person has been arrested or charged. Denning L.J., laid down the following three conditions for sustaining such a search.

(i) The police officers must have reasonable grounds for believing that a serious offence has been committed—so serious that it is of the first importance that the offenders should be caught and brought to justice;

(ii) That the police officers must have reasonable grounds for believing that the article in question is either the fruit, or is the instrument by which the crime was committed, or is material evidence to prove the commission of the crime.

(iii) The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it.

(2) Emergency Situations

Both the American and English courts recognize that in emergency situations a valid search may be made although no arrest has been effected and no warrant has been issued. The question whether there is an emergency to justify the the search depends on the facts and circumstances of each

particular case. In Taglavore v. United States,[68] when a person suspected of carrying narcotics attempted to swallow the contents of a container, the police officer put his arm around the suspect's neck to prevent him from swallowing the evidence. The court held that the police officer's action was justified in the circumstances of the case.

Again, in Cupp v. Murphy,[69] while the police were questioning Murphy at the police station in connection with the murder of his wife they noticed a dark spot on his (Murphy's) finger. Suspecting it to be dried blood the police took the sample of scrapings from his fingernails despite Murphy's protest and absence of a warrant. The evidence so obtained was later used to convict Murphy. The court upheld the search although at the time the samples were obtained Murphy was not even under arrest. In fact he was formally arrested after one month.

(3) Surveillance and Wire Tapping

In their fight against criminality, the police use different methods of eavesdropping like detectives in disguise, paid informers, bugging devices, wire tapping etc. These methods of surveillance have come to be accepted

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68. 291 F. 2d 262 (1961).

69. 412 U.S. 291 (1973); 935. Ct. 2000

both in America and England without much public outcry, even though they probably involve just as serious an invasion of privacy as beating down doors and rummaging through pockets.

In United States v. White,[70] the respondent was being tried for violation of narcotic laws. Evidence was offered at his trial of certain incriminating statements made by him and which the Government agents overheard by means of a transmitter which an informer had consented to wear during several conversations with the respondent. The Government agents, who had acted without a warrant, were allowed to testify about the statements they had overheard.

Again in Draper v. United States,[71] the petitioner was convicted of violating Federal narcotic laws. The record revealed that one Marsh, a Federal agent, was told by a reliable informer that a certain person would be arriving Denver from Chicago by train on a specified date bringing with him a quantity of heroin, and that he would be wearing a certain type of clothing, walking fast, and carrying a tan zipper bag. He also gave Marsh a detailed physical description of that person. On that date,

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70. 401 U.S. 745 (1971); In accord on similar facts is the decision in On Lee v. United States 343 U.S. 747 (1952).

71. 358 U.S. 307 (1959); 70 S. Ct. 329.

Marsh observed a person (Draper) with the "exact physical attributes and wearing the precise clothing" described by the informer alight from an incoming Chicago train and start walking "fast" toward the exit carrying a tan zipper bag. Marsh and another police officer arrested the man (Draper) and a subsequent search of his person revealed heroin.

The American Supreme Court held that with every aspect of the informer's information being personally verified by Marsh (except the information yet to be confirmed that Draper would be carrying heroin with him), the facts and circumstances were such that Marsh had probable cause and reasonable grounds to believe that petitioner was committing a violation of the laws of the United States relating to narcotics drugs at the time he arrested him. The arrest was, therefore, lawful; and the subsequent search and seizure, having been made incident to that lawful arrest, were likewise valid. Accordingly, the use of the seized heroin as a piece of evidence at the petitioner's trial was proper.

But in Katz v. United States,[72] FBI agents had placed microphones on the tops of two public telephone booths after they had discovered that Katz was routinely using

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72. 389 U.S. 347 (1967); 85 S. Ct. 507.

them in suspected gambling activities. Incriminating conversations were recorded and later introduced at his trial over his objection. He was convicted on counts of transmission of bets and wagers by telephone.

On successive petitions upto the United States Supreme Court, the question was whether evidence obtained by attaching an electronic listening and recording device to the top of a public telephone booth was obtained in violation of the right of privacy of the user of the booth.

The Supreme Court felt that when the petitioner entered the booth he sought to exclude uninvited ear, and that when he shut the door of the booth behind him he was entitled to assume that the words he uttered into the mouthpiece would not be broadcast to the world. Accordingly, the court held that the action of the agents violated his privacy and that his petition must succeed.

(4). The "Plain View" Doctrine

It has long been established both in America and England that objects falling in plain view of an officer who has the right to be in the position to have that view are subject to seizure without warrant and may be introduced in evidence. An object is said to be in plain view when it is exposed to view or when it can be plainly seen without a search. In other words, what a person knowingly exposes to the public, even in his own office or home

is said to be in plain view. On the other hand, what a person seeks to preserve as private, even in an area accessible to the public, is not in plain view.

CHAPTER III

SEARCH AND SEIZURE IN NIGERIA

The law on the subject of search and seizure in Nigeria is contained in two enactments, namely, the Criminal Procedure Code, 1960, which is in force in the ten Northern States, and the Criminal Procedure Act, 1945, which is in force in the nine Southern States. Although the two enactments operate in separate geographical areas, the substance of the law under both is more or less the same.

Since the present study relates to the subject of search and seizure with particular reference to the Northern States, our attention shall be mainly focussed on the provisions of the Criminal Procedure Code. However, in order to have a broader view of the subject, consideration shall also be given to those aspects of the Criminal Procedure Act where they significantly differ from the position obtaining under the Criminal Procedure Code.

I. SEARCH AND SEIZURE UNDER THE CRIMINAL PROCEDURE CODE

The Criminal Procedure Code provides for search of persons as well as of premises by the police, with or without a warrant. It also gives power to the police to seize property in certain cases. We may consider these aspects in greater detail.

A. SEARCH WITHOUT WARRANT

A search of persons and of premises may be made by the police without obtaining a warrant froma magistrate for the purpose. We may separately consider these situations here.

1. Search of Persons:

The police may search the person of an individual and take . property from him in the following circumstances:

(i) Section 44 of the Criminal Procedure Code provides that when a police officer makes arrest of a person or receives a person arrested by another person from the maker of the arrest, he may search the arrested person or cause him to be searched. If, as a result of such search, the police officer finds any article or property in the possession of the arrested person he may take the same into his custody.

Section 6(1) of the Criminal Procedure Act, on the other hand, qualifies the power of the police to search the person of the arrested individual by stating that if the person arrested is admitted to bail, and bail is furnished, then he shall not be searched unless there are reasonable grounds for believing that he has about his person: (a) stolen articles, or (b) instrument of violence or poisonous substance, or (c) tools connected with the type of offence which he is alleged to have committed, or (d) other

article which may furnish evidence in regard to the offence which he is alleged to have committed.

(ii) Further, section 25 of the Police Act also empowers a police officer to detain and search any person whom he reasonably suspects of having in his possession, or conveying in any manner, anything which he has reason to believe to have been stolen or unlawfully obtained.

It seems that the power given to the police by section 25 of the Police Act is wider than the power conferred on them by section 44 of the Criminal Procedure Code because the former authorizes the detention and search of a person who has not so far been placed under arrest; for example, it authorizes the police to stop and search all motor vehicles in the vicinity of a recent robbery though it is questionable whether the suspicion on every person in the vicinity of the scene of crime can be regarded as reasonable.

In Onuorah v. Commissioner of Police,[73] it was held that before exercising the power under section 25 of the Police Act, a police officer should not merely inform the person that he suspects him but must explain to the suspect that the suspicion is to the effect that he (the suspect) is carrying, or has on his person, property that has been stolen or unlawfully obtained, and must also

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73. (1960) W.N.L.R. 110.

tell him the grounds of suspicion. It was further declared that failure on the part of the officer to observe this procedure may justify resistance to the search by the person suspected.

(iii) Section 127(1) of the Criminal Procedure Code provides that a person under arrest upon reasonable suspicion of committing an offence may be required by the police to submit to a medical examination. In addition, section 128(1) of the Criminal Procedure Code provides that a police officer conducting an investigation may cause the fingerprints, photographs, or measurements of any person to be taken in furtherance of the purposes of the investigation.

In the context of the above provisions, the question may arise: To what extent can the police go in obtaining by force evidence from the body of a suspect?

It appears that where the evidence sought is of the type that strengthens the case for the prosecution, the consent of the suspect is required before he is examined. In Chimiokpu v. Commissioner of Police,[74] the appellant was alleged to have bought postal orders with a counterfeit £5 note. The next day, a clerk of the post office

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74. (1050) N.R.N.L.R. 1

went to the town in company of a policeman to return the £5 note to the appellant. When they saw the appellant, only the clerk went to him while the policeman kept his distance from them. The officer later joined them and arrested the appellant on the strength of the clerk's statement that he had handed over the note to the appellant; but the officer did not himself see the actual handing over by the clerk. The appellant protested that he had no bad money on his person and offered to be searched. He was then seen chewing something which was suspected to be the forged £5 note. As a result, he(appellant)was taken to a hospital for examination. And two hours after he was supposed to have swallowed the forged note, the appellant underwent an extremely drastic treatment by means of emetics, purges and enemas, which failed to reveal any trace whatsoever of any currency note or paper or such like material, though undigested vegetables, meat and carbohydrates, which were abundant and recognisable, were recovered.

Nevertheless, the trial Magistrate felt that the appellant had spat the paper out after chewing it up. He, therefore, convicted him on two counts under section 8 of the West African Currency Notes Ordinance, Cap. 230, for possessing and uttering a counterfeit £5 note and on one count under section 123 of the Criminal Code for destroying the evidence. An appeal was taken to the High Court, inter alia, on facts. Allowing the appeal, Hurley, S.P.J., stated obiter:

> We wish to add a few words about the taking of the appellant to the hospital and his treatment there. As things have turned out, the appellant may think himself fortunate that he received this treatment. Nevertheless, there is no evidence that he consented to it. Nor is there evidence that he did not consent. It is to be hoped that he did consent. In cases like this, it would be wise as well as humane to get the patient's consent before treating him, and to get it in writing.75

In Edene Ugama v The Queen,[76] the appellant was convicted of murder on the evidence of an accomplice. The trial court felt that the evidence of the accomplice was corroborated by a photograph showing the appellant and the accomplice standing together somewhere in the bush and pointing to the same spot which they were said to have identified as the place where the deceased was killed.

The appellant had unsuccessfully tried to show in his testimony before the trial court that he was dragged to the place where the photograph was taken, that he was beaten by the police, and that he did not point anywhere.

His appeal against conviction also failed because of the availability of other corroborative evidence apart from the photograph. In fact, the appellate court had rejected the photograph on different grounds. But the manner in which it was obtained received the following comment from Brett, F.J.,

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75. Id. at 5 - 6
76. (1959) 4 F.S.C. 218

> We also consider, though this was a matter for the discretion of the Judge, that before a person under arrest is invited to pose for a photograph which may tend to strengthen the case against him it would be in accordance with the spirit of the Judges' Rules for him to be cautioned again and told that he is not obliged to pose.77

The attitude of the Nigerian Courts towards extraction of evidence from the person of a suspect, as illustrated by the two foregoing cases, is that such extraction must be with the consent of the person to be searched. This approach finds support from the decisions of the Indian courts.

In Bhondar v. Emperor,[78] a boy of about 15 years of age was charged with the rape of a girl of 9 years. The boy was taken to a medical officer for examination and so was the girl. The medical report on the girl showed that her injuries were consistent with having been raped. The medical officer also told the court that he had examined the boy and that his findings as to the girl having been raped were consistent with an injury sustained by the boy when penetrating with difficulty the vagina of a girl. The jury returned a verdict of not guilty. But the judge, relying heavily upon the medical evidence, referred the case to the High Court because he considered the verdict to be perverse and contrary to the weight of evidence. Rejecting the reference, Lort-Williams, J. said:

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77. Id. at 219.

78. A.I.R. (1931) Calcutta 601.

> I am quite satisfied in my own mind that this evidence is not admissible. If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused, there is no knowing where such procedure would stop. It is to my mind quite contrary to the spirit of the law that evidence should be obtained in this way.79

Concurring, Ghose, J. said:

> The examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner's health, but simply by way of a second search, is not provided for by the Code, and in such a case the doctor may not examine the prisoner without his consent.80

The American law, on the other hand, recognizes in principle the power of the police to take evidence from the body of a suspect even without his consent. However, in considering whether or not to accept such evidence, the courts would have regard to the method employed in the search. If the search involves the taking of evidence from the body cavities, it should be conducted by a doctor who is working under sanitary conditions and in a medically approved manner. Where these precautions have been observed, American law would apparently not specifically require that consent of the suspect should first have been obtained. This is, however, not to contend that evidence

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79. Id. at 602

80. Id. at 604.

forcibly extracted from the body of a suspect is generally admissible under American law. For instance, in Antonio Rochin v. The State of California.[81] Frankfurter, J., of the American Supreme Court declared that in as much as the police cannot extract by force what is in the mind of an accused person, they cannot also extract what is in his stomach. He equated such evidence to coerced confessions and held it to be inadmissible under the Due Process Clause of the American Constitution. What must have shocked the conscience of the learned Judge in this case was the use of a stomach pump to extract evidence from the body of the accused person.

However, in Schmerber v. California,[82] the Court held that if blood was taken from a suspect in a "medically approved manner," such evidence was admissible. In this case, Schmerber was convicted of driving a motor vehicle while under the influence of intoxicating liquor. At the direction of the police during investigation, and over the objection of the petitioner, a physician extracted a sample of Schmerber's blood. The results of the laboratory examination were later introduced at his trial.

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81. (1951) 432 U.S. 165; 72 S. Ct. 205.

82. 384 U.S. 757 (1966).

He petitioned the American Supreme Court contending, inter alia, that the withdrawal of the blood and the admission of the analysis in evidence violated his constitutional rights against unreasonable search and seizure.

Dismissing the petition, the Court held that extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol; and because the record had shown that the petitioner's blood was taken by a physician in a hospital environment and in accordance with accepted medical practices, the petitioner's right against unreasonable search and seizure was not violated.

2. Search of Premises

Nigerian law permits the search of private premises by the police without warrant only in the following cases:

(i) Section 34 of the Criminal Procedure Code empowers any person authorized to make an arrest to search any place if he has reason to believe that the person to be arrested is within that place. An example here is where a police officer is chasing a fleeing criminal in order to effect an arrest.

(ii) Under section 85 of the Criminal Procedure Code a justice of the peace has the power to direct a search to be made in his presence of any place for the search of which he is competent to issue a warrant.

(iii) Where the entry upon premises is made with the consent of the occupier, an investigating police officer may look for evidence of the offence for which entry has been made. However, the occupier has the right to withdraw his consent at any stage and order the officer out of the place. If, after such an order to withdraw is made; the police officer refuses to comply with it, he becomes a trespasser as from that moment and the occupier or the person in charge of the premises has the legal right to resist any further attempt on the part of the officer to proceed with the search.

In R. v. Flight-Lieutenant Austin Robert Quinn,[83] a police officer who had received a report that a member of the Royal Air Force (R.A.F.) had committed suicide went to the camp and was admitted by the Corporal on duty. Before he could complete his investigation, he was noticed by the appellant. The appellant asked him to wait while he (the appellant) telephoned for instructions. The appellant subsequently told him to leave the camp. The appellant was convicted of obstructing the officer in the discharge of his duty. He appealed against the conviction.

Allowing the appeal, the West African Court of Appeal held that if the officer had wished to pursue the investigations upon the premises of the R.A.F. against the wishes

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83. 10 W.A.C.A. 243.

of the officer in charge, he should have gone there with the necessary search warrant; since he did not, the appellant was justified in ordering him out of the premises, and that from the moment he failed to obey that order, he became a trespasser and ceased to be acting in the execution of his duty.

But before the occupier can exercise his right of resistance against the searcher, he must first warn him and order him out. Failure on the occupier's part to observe this procedure may well result in his conviction for the offence of obstructing the searcher.

Thus, in the case of Commissioner of Police v. Igwe & Others,[84] three constables in mufti went to the appellant's (accused No.1) house to execute a search warrant which did not contain the names of the accused person. During the search, one of the constables who wanted to snatch a bag from the wife of the accused was assaulted by the accused.

The trial magistrate found on the evidence that the accused persons know the men to be policemen, and that they assaulted one of them in the discharge of his duty.

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84. (1961) All N.L.R. 9.

Accordingly, he convicted them.

On appeal against conviction, the appellants were acquitted on the ground that the constables had no proper warrant to search the premises of appellant No.1, and that the appellant was entitled to defend his rights.

On further appeal to the Supreme Court against acquittal, it was held that the police constables were not trespassers because their initial entry was lawful; and at no time before the assault had they been told to get out of the place. Moreover, said the Supreme Court, at the time of the assault on the constables their reasonable suspicions had been aroused as to the contents of the bag on account of the first respondent giving instructions to his wife to escape with it; therefore, they were justified in endeavouring to prevent her from doing so. Accordingly, the Supreme Court declared that the constables were clearly acting in the execution of their duty. The magistrate's judgment was, therefore, restored.

3. Taking of Property following a search

As we have seen above, the orthodox common law principle is that following arrest without warrant the police may seize from the person of an accused such property as may form evidence of the crime for which he has been arrested; and from the premises where entry was lawfully made, such property as may be used as evidence of the crime for which entry was effected. The question here is whether the police in Nigeria have

similar powers.

It is respectfully submitted that the power of seizure conferred on the police in Nigeria in such circumstances is much wider than what is allowed at common law. For example, under section 44 (2) of the Criminal Procedure Code the police may, apart from the wearing apparel of the arrestee, seize every other thing in his possession at the time of his arrest.[85] Furthermore, section 369 of the Criminal Procedure Code authorizes the police to seize without a warrant property stolen or suspected to be stolen and any other property suspected to be involved in any way in the commission of an offence.

4. "Reasonable suspicion" and "Reasonable belief"

In numerous provisions of the Criminal Procedure Code[86] dealing with search and seizure the words "reasonable suspicion" and "Reasonable belief" have been used to provide justification for the search of a person or property either at the initiative of the police, or a court, or a justice of the peace. We may, therefore, consider as to what elements constitute the justification in practical situations.

Laying down the test for "reasonable suspicion," Markby, J. said in the Indian case of Q. v. Behary Singh:[87]

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85. Section 6(1) of the Criminal Procedure Act contains a similar provision.

86. See, for example sections 77(1) and 81(1)

87. (1867)7 W.R. Cr. 3; see (1958) Journal of Criminal Law, vol. 22, 260 - 261.

"....what is a reasonable suspicion must depend on the circumstances of each particular case; but it must at least be founded on some definite facts tending to throw suspicion on the person....and not on mere vague surmise or information."

The occasion to determine what is "reasonable sus-suspicion" arose in the Nigerian case of Sarkin Kiniba Tsoho Ladan v. Zaria Native Authority.[88] In this case, a police constable wanted to arrest the appellant's son on a suspicion of involvement in a riot. There was no evidence that the suspect had committed any offence; nor was there any complaint against him. In other words, there was nothing by way of "definite facts" on which suspicion could be based. When, therefore, the constable wanted to enter the appellant's house so as to arrest the appellant's son the appellant resisted him by force. For this, the appellant was convicted by the trial court of obstructing and assaulting a public servant. He appealed against the conviction.

Allowing the appeal, the High Court held that although the evidence showed that the police suspected the appellant's son, there was no evidence of the grounds on which the suspicion was based; it was, therefore, impossible to say whether the suspicion was reasonable or not, and consequently, there was no evidence of any reasonable suspicion against the appellant's son.

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88. (1962) N.N.L.R. 53.

The test for "reasonable belief" according to Smith, S.P.J.,[89] is also objective. In other words, the belief must be founded on some facts which, in the judgment of an average person, makes it credible.

Sarkar[90] also states that "reason to believe" connotes a great deal more than is conveyed by "cause to suspect", and that a reasonable belief has to be based on definite facts.

In Rajendra Nath Mandal v. Anukul Chandra,[91] a warrant was issued by a magistrate for the search of a minor woman on the allegations of her husband that she had been taken away by her father and was being detained by him against her wishes. On revision, the sessions Judge took the view that the grounds made out for the issue of the warrant were not good. The High Court of Calcutta held that the magistrate was the best judge about the bona fides of an application for search of a person wrongfully confined under section 97 of the Indian Code of Criminal Procedure and that the allegations need not reach that precision and particularity which may establish definitely that the confinement was in fact an offence.

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89. Chukwuka v. Commissioner of Police (1964) N.N.L.R. 21 at 24.

90. Sarkar, (1960), Law of Criminal Procedure, 99.

91. (1957) A.I.R. Calcutta 137.

It is submitted that what the High Court seems to have held is that there must be only prima facie case and not proof that an offence of wrongful confinement has been committed. And, on the basis of the ruling, it may be said that the requirement of "reasonable belief" may be satisfied if an applicant can put up a prima facie case of wrongful confinement.

B. SEARCH WITH WARRANT

The Criminal Procedure Code contains a number of provisions under which a search warrant can be issued for various purposes. For example, search warrants may be issued: (1) under section 74 for gathering evidence in an investigation, inquiry or trial; (2) under section 76, for the inspection of a place believed to be used for the deposit or sale of stolen property; and (3) under section 77, for the search of a person wrongfully confined.

Let us consider these cases in greater detail:

1. Search warrant for gathering evidence

Section 74 of the Criminal Procedure Code provides that where a court or justice of the peace has reason to believe that issuing a summons under section 73 of the Criminal Procedure Code to any person for the production of any document or article for the purpose of an investigation, inquiry, trial or other proceeding under the Code is impossible or inadvisable, or that a search or inspection would further the purposes of any investigation, inquiry,

trial or any other proceeding under the Code, the court or justice of the peace may issue a search warrant authorizing the person to whom it is addressed to search or inspect the place or places specified in the warrant and seize the document or thing described and dispose of it as directed in the warrant.

The issue of a search warrant here is a judicial act; therefore a search warrant must be issued only after the magistrate has acted as a court and applied his judicial mind to the matter. The warrant is issued not only when a proceeding is actually pending before a court, but also at any time after the process for the initiation of such proceeding was set in motion, for example, at the stage of investigation.

Section 75 of the Criminal Procedure Code lays down that a police officer conducting an investigation under the Code may also apply for the issue of a search warrant under section 74 to any court or justice of the peace within the local limits of whose jurisdiction he happens to be. The warrant has to be in Judicial Form 8.

2. Search warrant for inspection of a place

Section 76 of the Criminal Procedure Code provides that where a court or justice of the peace has, upon information received and after such inquiry as it thinks necessary, reason to believe that any place is used for the deposit or sale of stolen property or there is kept or deposited

there any property in respect of or by means of which an offence has been committed or property which is intended to be used for an illegal purpose, the court or justice of the peace may issue a search warrant. The section further provides that such a search warrant may authorize any police officer: (i) to search the place and to seize any property appearing to be of any description specified in the warrant and to dispose of such property in accordance with the terms of the warrant; and (ii) to arrest any person found in the place and appearing to have been or to be a party to any offence committed or intended to be committed in connection with the property.

It is to be observed that while a warrant under section 74 of the Code is issued to seize a specific document or thing or to inspect a place for the purpose of either an inquiry, trial or investigation already started, the issue of a warrant under section 76 of the Code is not pre-conditioned upon the existence of a proceeding against any person. Therefore, a court may issue a warrant under section 76 of the Code upon a complaint from a member of the public and after examining the complaint.

However, before a warrant is issued under section 76 of the Code, there must be some allegation or information leading the court to believe that a particular place is

being used for the deposit or sale of stolen property; otherwise it will be illegal to issue a warrant. Of course, it will be illegal, on the other hand, to conduct a search without a valid search warrant under section 76.[92]

Further, before a warrant is issued under section 76, the court or justice of the peace has to sit in a judicial capacity, examine the allegation or information brought before it or him and be satisfied that there are reasonable grounds for believing that the search will yield some positive result.[93]

For the purpose of a search under this section , a warrant is issued in Judicial (N.R.) Form 8.

3. Warrant for search of person wrongfully confined

Under section 77(1)a of the Criminal Procedure Code, a court may issue a search warrant if, upon information and after such inquiry as seems necessary, it has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence.

"Wrongful confinement" is defined by section 255 of the Penal Code, 1960, as the wrongful restraint of any person in such a manner as to prevent that person from

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92. See Shani, (1981), Some Aspects of Criminal Procedure in Northern States of Nigeria, 44.

93. See Kuku v. Olushoga, (1965), 1 All. N.L.R. 626.

proceeding beyond certain circumscribing limits and it is declared to be an offence by sections 257-261 of the Penal Code.

The person to whom such a warrant is addressed is, according to section 77(1) of the Criminal Procedure Code, authorized to search for the person allegedly confined in accordance with the terms of the warrant and, if found, to bring him before the court, whereupon the court shall make such order as seems proper.

Although the holding of an inquiry is a necessary requirement under the provision, it may nevertheless be dispensed with where the informant claims that the person confined is in immediate danger of severe physical harm.[94]

4. Warrant for search of a person abducted or unlawfully detained

Sub-section (2) of section 77 provides further that whenever a complaint has been made upon oath that a person has been abducted for an unlawful purpose or is unlawfully detained, any court may, with or without an inquiry, (i) order the production of the person before it and, therefore, make any order it deems fit; or (ii) order the person's immediate liberation; or (iii) if the person detained is under fourteen years, order his immediate restoration to his parents or lawful guardian.

It is noteworthy that nothing like section 77 of the Criminal Procedure Code exists in the Criminal Procedure Act.

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94. See Shani, supra, n. 91, 41 - 42.

4. Search warrant under section 77, and Writ of Habeas Corpus: A comparison.

The issue of a search warrant under section 77 of the Criminal Procedure Code is not the only means of securing the production of a person wrongfully confined before a court. An alternative procedure exists by way of an application to the High Court for the issue of a writ of habeas corpus under section 35 of the High Court Law.[95]

The prerogative writ of habeas corpus which had its origins in English Common Law is used by the High Court to command a person who is detaining another person in his custody to produce the body of the person detained before the High Court to enable it determine the legality of such detention and to pass such order as may seem appropriate in the circumstances of the case.[96]

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95. Under this provision, whenever the Nigerian laws are silent as to the manner in which High Courts shall exercise jurisdiction over civil causes and matters, High Courts in the Northern States shall exercise jurisdiction "in conformity mutatis mutandis with the practice and procedure for the time being of the High Court of Justice in England."

Since the High Court Law, Cap.49, of the Northern States does not contain any specific procedural provisions relating to the issuance of the writ of habeas corpus, reference on this matter may be made to the practice and procedure of the High Court of Justice in England by virtue of section 35 of the High Court Law.

In England, the current High Court rules of practice and procedure governing habeas corpus applications are contained in 054 of the Rules of Supreme Court i.e., R.S.C. 054.

96. Lawson, (1961), Constitutional and Administrative Law, 296 - 9; Also see generally Aihe and Oluyede, (1979), Cases and Materials on Constitutional Law in Nigeria, 152 - 167.

The writ may generally issue:[97]

(a) Where it is alleged that any person is detained unlawfully or unjustifiably whether in prison or in private custody.

(b) Where any person has been wrongfully deprived of his liberty by an inferior court or tribunal, for instance, where the trial court lacked jurisdiction to try the offence in connection with which the person has been detained; or where it has imposed a sentence which is beyond its sentencing power as contained in the court warrant; or where it has sentenced a person not subject to its jurisdiction and not consenting to his trial by such court; or where the person was charged and tried for one offence but the court has convicted and sentenced him for a different offence for which the charge could not even be substituted .

(c) Where a prisoner is still being held after the expiration of the term of his imprisonment.

The two processes (i.e., search warrant under section 77 of the Criminal Procedure Code and writ of habeas corpus under section 35 of the High Court Law) are similar on the following points:

(i) Both processes aim at securing the liberty of persons unlawfully or wrongfully detained.

(ii) Both are issued only after the court is satisfied as a result of a judicial inquiry held by it that circumstance warrant that they be issued.

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97. See Obi-Okoye, (1980), Essays on Civil Proceedings, Vol. 3, 5 - 10.

Despite these similarities, the two processes have the following important points of difference:

(i) A search warrant under section 77 is a process limited to the Code of Criminal Procedure. But the writ of habeas corpus has its roots in the common law. Therefore, while a search warrant under section 77 of the Code of Criminal Procedure can be issued only by the courts of of the Northern States of Nigeria, the writ of habeas corpus can be obtained in every High Court in Nigeria.

(ii) Basically, a search warrant under section 77 is meant to cater for situations where the detention is illegal and amounts to an offence. But the writ of habeas corpus may issue even where the detention, though unlawful, does not amount to an offence; thus, it enables the High Courts to exercise supervisory jurisdiction over inferior courts and tribunals and ensure that they not only observe statutory law but also the rules of natural justice.

(iii) A search warrant can be issued by any court including an Area Court and a Magistrate Court. But the writ of habeas corpus can be issued only by the High Court or a single judge of the High Court.

(iv) A search warrant is addressed to some person other than the person having the detainee in his custody; because the custodian of the detainee cannot be directed to search for him. But the writ of habeas corpus is

directed to the person in actual custody of the detainee or to the person who has authority to order the release of the detainee.

(v) Ordinarily, it may be easier to obtain a search warrant than a writ of habeas corpus. This is because the former, being a process which can be issued by courts lower than a high court, is also subject to less stringent formalities than the latter.

II. SEARCH AND SEIZURE UNDER OTHER LAWS

In addition to search warrants which may be issued under the provisions of the Criminal Procedure Code and the Criminal Procedure Act, search warrants can also be issued under certain other statutes. No doubt, the provisions of the Criminal Procedure Code relating to search also apply to searches under other statutes; but such statutes may give special powers for the search of the person, property or premises of an individual to suit the particular needs of the statutes.

For instance, under section 5 of the Children and Young Persons (Harmful Publications) Act, 1961, a search warrant may be issued where a person is reasonably suspected of being in possession of any book, magazine, and the like, to which the Act applies; the Exchange Control Act, 1962 (Schedule 4, Parts 1 - 3) confers powers to search premises in order to discover evidence of the commission of an offence against the Act; sections 131-133 of the

Customs and Excise Management Act, 1958, also confer the power on Customs Officers to order searchers for enforcing the provisions of the Act.

III. PROCEDURAL REQUIREMENTS

Since the search of either a citizen's person, property or premises constitutes an invasion of the privacy and home [as guaranteed to him by section 34 of the Constitution of the Federal Republic of Nigeria, 1979], the law has hemmed the exercise of the powers of search and seizure by various requirements.

We may consider these requirements under two major heads: (A) requirements regarding the issue of search warrants; and (B) requirements regarding the execution of search warrants.

A. REQUIREMENTS FOR ISSUE OF SEARCH WARRANTS:

1. Necessity for issuing a warrant to be determined

The sole authority to determine whether or not a search warrant is necessary in a particular case is the court or justice of the peace before whom the question arises. Before issuing the warrant, the court or justice of the peace has to satisfy itself or himself that there are reasonable grounds justifying the issue of the warrant. In forming its opinion, the court of justice or the peace may take into consideration even facts which may not strictly amount to evidence under the Evidence Act.

2. Warrant must not be general.

The Criminal Procedure Code does not sanction the issue of a general search warrant; therefore, warrant must generally name the person to be searched; describe the place to be searched; and specify the property to be taken.

3. Warrant must be in writing, signed or sealed

Every warrant has to be in writing signed or sealed by the court or justice of the peace issuing it;[98] and it remains in force until it is executed or cancelled.[99]

4. Warrant to be executed by the person to whom it is addressed.

It would seem that sections 74 and 77(1) of the Criminal Procedure Code envisage that a warrant issued thereunder be addressed to a particular person and that the person to whom it is addressed is expected to execute it himself. On the other hand, a warrant issued for the search of stolen property under section 76(1) of the Criminal Procedure Code is not necessarily required to be executed by the person to whom it is addressed. Such warrants, which are usually addressed to "all police officers" in a given district, or to "the police officer" in charge of a particular police station, or to "the Commissioner of Police," may be executed by any other police officer whose name is endorsed on the warrant.

In general, a warrant directed to more persons than

98. See section 56(1) of the Criminal Procedure Code which is applicable to search warrants by virtue of section 72 of the Criminal Procedure Code.

99. See section 56(2) of the Criminal Procedure Code. The provision is applicable to search warrants by virtue of sections 72 and 84 of the Criminal Procedure Code.

one may be executed by all or by any one or more of them.[100]

B. REQUIREMENTS FOR EXECUTION OF SEARCH WARRANTS

1(a). Search to be conducted in the presence of witnesses

According to section 78 of the Criminal Procedure Code, unless the court or justice of the peace directs otherwise, searches under sections 74, 75, 81 and 85 of the Code shall be made, whenever possible, in the presence of two respectable witnesses of the neighbourhood to be summoned by the person to whom the search warrant is directed.

However, this requirement finds no place in the Criminal Procedure Act. It means searches in the Southern States can be witnessed by persons from anywhere and there will be no insistance on witnesses from the neighbourhood.

(b) Effect of failure to summon witnesses

In the opinion of the High Court of Northern Nigeria as expressed in the case of Obey Chukwundindu v. Commissioner of Police[101] the presence of witnesses is necessary, and the failure to summon them may lead to the rejection of the evidence obtained as a result of the search. In this case, the appellant was convicted of theft by taking goods from the possession of the Nigerian Railway Corporation at Zaria. There was no eye-witness to the taking but at the

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100. See section 58(2) of the Criminal Procedure Code which applies to search warrants by virtue of s.84 of the Criminal Procedure Code.

101. Unreported 2/3/CA/63.

trial a police constable testified that he had searched the appellant's compound and found the stolen goods there. The appellant claimed that the goods lawfully belonged to him. The constable contended that the search was made in the presence of several women from the neighbourhood, although none of them appeared at the trial and their absence was not accounted for. Commenting on the apparent failure by the officer to comply with section 78(1) of the Criminal Procedure Code, Hurley, C.J. said:

> Section 78(1) is not there for nothing; its purpose is to ensure that searches should be conducted in the presence of independent witnesses and these witnesses should be available to give evidence in court if a dispute as to what was done or found during the search renders their evidence necessary.[102]

However, where there is no dispute as to the evidence recovered during the search, failure to observe the requirements of section (78(1) of the Code will not by itself render such evidence inadmissible. In Musa Sadau and Another v. The State,[103] the appellants were arraigned before the High Court on various charges. The first appellant and two other persons were involved in an unauthorized printing of vehicle licences and similar forms at the Government Press and illegally selling the same for money.

The case against the first appellant was that he had procured the second accused (whose motion to appeal to the Supreme Court was rejected as being out of time) to print for him a

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102. See Zalman, (1969) Cases and Materials on the Criminal Procedure in the Northern States of Nigeria, 86.

103. (1968) N.M.L.R. (Part 2) 208.

quantity of vehicle licensing forms which he had sold for money to various vehicle owners. When his house was searched, a large quantity of vehicle licences, forms, and similar papers were recovered. In his testimony before the court, he said that his sole occupation was that of a bicycle repairer and that all the goods allegedly recovered from his house were planted there by the police officer who conducted the search. The trial judge had disbelieved his story and convicted him on the evidence of the prosecution witnesses.

On appeal to the Supreme Court, it was contended that because section 78(1) of the Criminal Procedure Code was not complied with during the search, in as much as no neighbours were summoned as witnesses, the search was illegal; and, therefore, the properties recovered from the appellant's house during the search should not have been admitted in evidence by the court.

The respondent's reply was that section 78 of the Code was merely recommendatory and did not make the presence of witnesses mandatory during a search.

Dismissing the appeal, the Supreme Court held:

(a) There is no general rule of law in civil as well as in criminal cases that evidence which is relevant shall be excluded merely by reason of the way in which it has been obtained.

(b) In criminal cases, a trial judge has a discretion to set the essentials of justice above technical rules if the strict application of the latter would operate unfairly against the accused. (c) If the proper procedure was not followed, an irregularity may or may not have occurred, depending on the circumstances; but the consequence of the irregularity will attach to the persons executing the warrant and not to the evidence which is thereby obtained. (d) In the present case, the properties were produced in evidence without objection and there was no suggestion at the time of their production that they would operate unfairly against the appellant; and in consequence the court was justified in admitting the evidence.

This case has, therefore, firmly established the rule that even if section 78(1) of the Criminal Procedure Code is not complied with the evidence of a search, if relevant, is admissible, unless the court decides that the admission of such evidence would operate unfairly against the accused.

But the decision in Commissioner of Police v. Michael David[104] has established that section 78(1) of the Criminal Procedure Code does not apply to searches not conducted under section 74, 76, 77, 81 and 85 of the Code. Therefore, failure to summon persons of neighbourhood

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104 (1963) N.N.L.R. 27

to be witnesses of such searches will not affect the results thereof.

In this case, an employee of the A.T.M.N. was charged before the Chief Magistrate, Jos, of being in unlawful possession of his employee's properties. His house was searched not by the police but by two A.T.M.N. security officers who possessed no search warrant and who did not make the search in the presence of two witnesses as required by section 78(1) of Criminal Procedure Code.

The following question was referred by the trial magistrate to the High Court under section 260 of the Criminal Procedure Code: "When a search of premises is conducted which does not comply with the provisions of section 78(1) of the Criminal Procedure Code, is evidence obtained as a result of the search admissible against the occupier of the premises?"

The High Court, having found that on the facts of the case the search was not of the type contemplated or known to the Criminal Procedure Code, declined to consider the question referred by the magistrate.

2. Search of a place to be in occupant's presence

According to section 80 of the Criminal Procedure Code, the occupant of the premises to be searched or his representative is entitled to be present throughout the search. Also, he must, at his request, be furnished with a copy of the list of the articles seized herein, duly signed or sealed by the two search witnesses.

3. Woman's quarters to be searched after notice

Section 79 of the Criminal Procedure Code provides that the apartment in the actual occupancy of a woman who by custom is living in purdah may only be entered or searched after the person making the search has given her notice of his intention to enter and offered her reasonable facilities to withdraw. However, this facility will not be given to a woman who is herself the person to be arrested.

4. Woman must search a woman

According to section 82 of the Criminal Procedure Code, the person of a woman can only be searched by another woman with strict regard to decency.

5. Reasonable force may be used in executing search Warrant

Any person authorized to execute a search warrant may use reasonable force to execute the search if there is resistance to it.[105]

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105. See S.34(3) of the Criminal Procedure Code applicable to search warrants by virtue of section 84 of the same Code.

6. Search of place where person to be arrested enters

According to section 34 of the Criminal Procedure Code if anyone who is authorized to arrest any person has reason to believe that such person has entered into or is within any place he may enter such a place and search for the person to be arrested. On demand by him, the person residing in or being in charge of the place to be searched shall allow free ingress thereto and afford all reasonable facilities for the search of the person to be arrested.

If, on demand, free ingress is refused, the person authorized to make the arrest may effect an entry by force.

7. Execution of search warrant outside jurisdiction

Section 83 of the Criminal Procedure Code provides that a search warrant may be executed outside the local limits of the jurisdiction of the court or justice of the peace issuing it only after application to execute it has been made by the person executing it to a court possessing jurisdiction over the place to be searched; and such person shall act under the direction of such court.

C. RETENTION AND DISPOSAL OF ITEMS TAKEN

A warrant authorizing the seizure of any article usually directs the person authorized to conduct the search as to the manner in which the article taken shall be disposed of.

Under section 361 of the Criminal Procedure Code, the police are required to immediately report to court the seizure by them of the property found on the person of an arrested individual,[106] or alleged or suspected to be stolen property, or found in circumstances which create a suspicion of the commission of an offence; and the court shall make such order as it thinks fit respecting the disposal of the property or its delivery to the person entitled to its possession, or if such person cannot be ascertained, respecting the custody and production of such property.

According to section 6(5) of the Criminal Procedure Act, where any property has been taken from any person who is not charged before any court but is released on the ground that there is no sufficient reason to believe that he has committed any offence, such property shall be restored to him.

Section 356 of the Criminal Procedure Code empowers criminal courts before which any property produced during any inquiry or trial has been the subject of, or used for the commission of any offence ××××××××to make suitable order regarding its custody pending the conclusion of such trial or inquiry, or if it is of a perishable nature, regarding its sale or disposal.

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106. See also section 44 of the Criminal Procedure Code.

Section 357 provides that after the completion of the proceedings the court may direct that the property which has been the subject, or which has been used for the commission of any offence be disposed of by way of either confiscation, destruction or delivery to the person entitled to possession thereof.

IV. CHANGES CONSEQUENT UPON THE MILITARY TAKE-OVER

When the military took over the control of the Federal Government on 31 December, 1983, they abrogated the pre-existing legal order with the exception of what they decided to preserve. Under the new system, the Federal Military Government is empowered "to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever;"[107] and Military Governors of States are vested with similar powers in respect of the States they administer.[108] Consequently, any decree promulgated by the Federal Military Government in the exercise of its legislative functions prevails over the unsuspended provisions of the Constitution of the Federal Republic of Nigeria 1979, and that of any other law or enactment in the country.

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107. See section 2(1) of the Constitution (Suspension and Modification) Decree 1984, No.1.

108. See section 2(3) of the Constitution (Suspension and Modification) Decree 1984.

Similarly, any Edict issued by the Military Governor of a State within the scope of his legislative powers prevails over any other existing law in the State.

In effect therefore, the provisions of the Criminal Procedure Code and the Criminal Procedure Act relating to search and seizure will also operate subject to all Federal Decrees and respective State Edicts.

Notwithstanding this new development, however, the law on search and seizure remains basically unaffected by the new legal order because section 15(1) of the Constitution (Suspension and Modification) Decree 1984, which came into force on 31 December, 1983, has preserved all existing laws (other than the Constitution of the Federal Republic of Nigeria, 1979), subject to any alteration made by any Decree or Edict passed by the authority having power to do so. And no Decree or Edict has so far made any change in the substance of the law in this area.

Of course, some of the Decrees promulgated by the new administration have ousted the jurisdiction or power of ordinary courts as regards the issue of search warrants with respect to offences created under such Decrees. For instance, section 5(2) of the Special Tribunal (Miscellaneous offences) Decree 1984,[109] which has created various

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109. Decree No. 20.

offences,[110] e.g., arson of public buildings, expertation of foodstuffs, dealing in cocaine, and selling prohibited goods, has vested in the Chairman of the Tribunal constituted under the Decree the power to issue a warrant for the search of any building or other place in order to recover anything material to the subject matter of a trial under the Decree.

Similarly, section 9 of the Counterfeit Currency (Special Provisions) Decree 1984,[111] gives to the Chairman of the Tribunal created under the Decree the power to issue a warrant under his hand for the search of any building or other place where he has reasonable ground to suspect may be found things material to the subject-matter of any trial under the Decree.

Again, section 8 of the Recovery of Public Property (Special Military Tribunal) Decree 1984[112] gives the Chairman of the Tribunal created under the Decree the power to issue a warrant for the search of any building or place if he is satisfied that there is reasonable ground to suspect that there may be found in that place or building any books, records, accounts, information, or anything whatsoever which, in his opinion, are or may be material to the subject-matter of any trial under the Decree.

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110. See section 3 of the Decree No. 20 for a comprehensive list of the offences.

111. Decree No. 22

112. Decree No. 3.

Even a cursory look at the Decrees mentioned above brings into sharp focus three points:

First, the Chairmen of the Tribunals constituted under these Decrees possess powers to issue warrants for the search of any premises if they reasonably suspect that there may be found therein any article or thing which may be the subject matter of any trial under the concerned Decree. This means that these Decrees dispense with the requirement of holding an inquiry prior to the issue of a search warrant as prescribed under the ordinary laws. What is more, a warrant may be issued under the Decrees upon "reasonable suspicion" of the Chairmen only. This obviously imposes a less stringent requirement on the Chairmen than the term "reasonable belief" imposes on a court or justice of the peace for the issue of a warrant under the ordinary laws.

Secondly, on the wording of the Decrees it appears that warrants may be issued even if no proceedings are pending before the respective tribunals. This is different from the position under the ordinary laws.

Thirdly, the Decrees are silent about the observance of the procedural requirements which have their own importance under ordinary laws; for example, the summoning of search witnesses from the neighbourhood.

However, it is hoped that despite the silence of the Decrees about the procedural requirements, the persons conducting the search would still be guided by them in order to appear fair and just to the citizens.

CHAPTER IV

ADMISSIBILITY OF EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE

One of the most important points in connection with search and seizure is whether the evidence obtained as a result of an illegal search and seizure can be used in any proceeding before a court of law.

This point actually involves two questions:

(a) When does search and seizure become illegal?

(b) Is the evidence obtained by means of illegal search and seizure admissible in an inquiry or trial?

We may consider these questions in the present chapter.

A. WHEN IS SEARCH AND SEIZURE ILLEGAL?

The simplest answer to the question is: when they are made in an irregular or unlawful manner. Since the law in most cases requires the search to be made only in pursuance of a warrant issued by a court or by a justice of the peace authorizing it, the search becomes illegal: (1) if it is conducted without warrant where a warrant is required; or (2) if it is conducted under a defective warrant or a warrant wrongfully obtained; and (3) if it is conducted in an irregular or unlawful manner.

1. Search without warrant where a warrant is required:

Where a search warrant is required for the purpose of making any search, it is illegal to conduct it without a warrant. For instance, for the purpose of a search under section 74, 76 and 77 of the Criminal Procedure Code, a search warrant is always required; therefore, any search without warrant would be clearly illegal. Thus, In R. v. Flight Lieutenant A.R. Quinn,[113] a police officer went to the Royal Air Force to investigate the cause of a man's alleged suicide. He had no search warrant in his possession. Although he was initially allowed to conduct the investigation, yet before he could finish it, he was asked by Quinn, who was in charge of the camp to leave the camp. For this, Quinn was convicted of the offence of obstructing a public servant in the discharge of his functions under section 148 of the Penal Code.

On appeal against the conviction, it was held that the police officer could only pursue the investigations in question against the wishes of the authorities of the Royal Air Force if he had had the necessary warrant; since he had no warrant, he became a trespasser after Quinn had asked him to leave the premises and could not be said to be acting thenceforward in the execution of his duty; therefore, Quinn could not be convicted of assaulting or obstructing him in the execution of his duty.

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113. Supra, n. 83.

2. Search under a defective or wrongfully obtained warrant

A warrant becomes defective if it does not contain all matters required by law to be stated therein, namely, the place to be searched, the article required to be taken, and the person authorized to conduct the search, and so on.

In King v. The Queen,[114] the appellant was searched by a police officer acting under a search warrant obtained under the Dangerous Drugs Law. The said Law permits any police constable "named" in the warrant to enter the premises indicated in the warrant and to search any person found therein. But, in the instance case, the police officer was acting under a warrant which was addressed "to any lawful constable" of a named district (without naming any particular constable). Further, the warrant had not named the appellant as the person to be searched. The police officer found the appellant to be in possession of a dangerous drug. The trial court convicted the appellant on the basis of this evidence. He appealed against his conviction.

Allowing the appeal, the Court held: (i) that the search of the appellant was not justified by the terms of the warrant because the warrant did not authorize the search of any particular person; and (ii) that the Dangerous Drugs Law permitted search only by a constable "named" in the warrant; and the word "named" could not be given a wider

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114. (1968) 3 W.L.R. 391.

meaning such as "designated", "specified" or "identified."

The appeal court further declared that because the appellant's search was not justified by the warrant, the dangerous drug found on him constituted evidence which had been unlawfully obtained.

3. Search conducted in an unlawful manner

A search is regarded as having been conducted in an unlawful manner if, for example, it involves a violation of the prescribed procedure. For instance, where any place is to be searched, section 80 of the Criminal Procedure Code permits the presence of its occupant or his representative during the search. Therefore, if the person conducting the search of a place refuses to permit the presence of its occupant or his representative during the search, the search would be unlawful.

Also, unless the court or justice of the peace issuing a search warrant directs otherwise, it will be unlawful to conduct the search of any premises without witnesses as required by section 78(1) of the Criminal Procedure Code.

B. EVIDENTIAL VALUE OF PROPERTY ILLEGALLY SEIZED

1. At Common Law

In considering whether evidence obtained by search and seizure is admissible or not, courts are under the common law not concerned with the method by which it has been obtained. This is so because admissibility of a piece of evidence is based on relevancy - a requirement which is not affected by the illegality of the means used to secure it.

However, this rule is not always strictly applied to evidence in criminal cases. Here, the judge has a discretion to disallow evidence illegally obtained if its admission would operate unfairly against the accused.[115] In the words of the Privy Council in Kuruma v. R.[116]

> ....the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.... There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case a judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

In this case, the appellant was tried on a charge of being in unlawful possession of ammunition, contrary to regulation 8 of the Kenya Emergency Regulations, 1952. Regulation 29 of the Regulations required the search to be made by an officer of or above the rank of an Assistant Inspector. In violation of the requirement, the appellant was searched by two junior officers who found two rounds of ammunition on him.

On appeal against conviction, it was contended on behalf of the appellant that the search was illegal and that the evidence was inadmissible.

The appeal was dismissed on the ground that the appellant had failed to show that the evidence would operate unfairly against him.

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115. Williams, "The English View: Rejection of the Exclusionary Rule,")1962) Police Power and Individual Freedom, 105 - 108.

116. (1955) A.C. 197.

In the exercise of their discretion to disallow evidence obtained by illegal means the courts in England have emphasized that even in criminal cases the only ground upon which otherwise admissible evidence may be excluded is the proof that the evidence has been obtained by a trick or by false representation or by the police acting repressively..[117] The following three cases illustrate the principle.

In R. v. Payne,[118] following a car collision the defendant was taken to a police station and asked whether he was willing to be examined by a doctor. It was made clear to him that the purpose of the examination was to see if he was suffering from any illness or disability, and that it was no part of the doctor's duty to examine him in order to give an opinion as to his fitness to drive. The defendant thereupon agreed to be examined by the doctor. At his trial on a charge of driving a car while unfit to drive through drink, the doctor gave evidence for the prosecution to the effect that the defendant was under the influence of drink to such an extent as to be unfit to drive. The defendant was convicted.

His appeal against conviction was allowed on the ground that had he realised that the doctor would give evidence as to his fitness or unfitness to drive he might have refused

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117. Supra, n. 54

118. Supra, n. 65

to allow himself to be examined; and, therefore, the trial court should, in the exercise of its discretion, have refused to allow the medical evidence to be given despite the fact that it was admissible.

In Callis v. Gunn,[119] the defendant was charged with stealing £7. While in custody, he was asked to give his fingerprints. At no time was he cautioned that he might refuse, and that if he did give his fingerprints they might be used in evidence. He gave his fingerprints without objection. At his trial, the justices refused to admit the fingerprint in evidence and dismissed the charge.

The prosecutor appealed on the ground that the justices ought to have admitted the evidence.

Allowing the appeal, the Court held: (i) that evidence of fingerprints when relevant is admissible subject only to the general principle that in criminal cases the court has an overriding discretion to disallow evidence if its admission would operate unfairly against a defendant; (ii) that the discretion should be exercised if the evidence has been obtained oppressively or by false representation, trick, threat or bribe; and (iii) that in the present case there was no misrepresentation by the police officer and caution to the respondent was unnecessary before taking his fingerprints.

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119. (1964)1 Q.B. 495.

In R. v. Murphy,[120] the accused, a soldier serving in the army, had come under suspicion. A police officer acting under superior orders and posing as agent of a subversive organization elicited information from him by a series of questions relating to the security arrangements in his barracks. The accused was tried before the Court-Martial for disclosing information useful to an enemy. Regarding the evidence elicited from him, his counsel prayed that the judge should in his discretion reject it for it had been obtained by an agent provocateur who had made the first approach to the accused and had questioned him. But the Court-Martial admitted the evidence and convicted the accused.

On appeal, MacDermott, C.J., declared that the law is not that any evidence obtained by false pretence or trick is to be regarded as oppressive and left out of consideration; but that the law is that evidence is admissible if it is relevant, and that the court has a discretion to exclude it if it is oppressive; since the evidence in this case was not oppressive, because the appellant was a willing informer, the Court-Martial was right to admit it.

2. Under Nigerian Law

The position of common law as enunciated by the Privy Council in the case of Kuruma v. R.[121] has been adopted by the Federal Supreme Court of Nigeria in the

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120. 30 Journal of Criminal Law 205; (1965) N.I. 138

121. Supra, n. 116.

leading case of Musa Sadau and another v. The State.[122] In this case, the appellants were alleged to have been involved in a racket by which vehicle licences and similar forms were printed at the Government Press without authority and illegally sold for money. When the first appellant's house was searched, a large quantity of vehicle licence forms and similar papers were recovered. The search was not conducted in the presence of witnesses of neighbourhood. The items were admitted in evidence and the appellants were convicted. They appealed against their convictions, contending that the failure to comply with section 78(1) of the Criminal Procedure Code rendered the search illegal; therefore, properties recovered in consequence thereof should not have been received in evidence.

Dismissing the appeal, the Supreme Court declared that there is no general rule in civil as well as in criminal cases that evidence which is relevant is excluded merely on account of the way in which it has been obtained.

It further said that in the present case properties recovered in the house of the appellant were the subject matter of the charge against him, and the properties were produced in the court without any objection or suggestion by the defence that such evidence would operate unfairly against the appellant.

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122. Supra, n.103; The case of Kuruma v. R. was also followed in Alajawo v. Commissioner of Police (1971) U.I.L.R. 166.

However, the fact that the search is irregular or illegal necessitates a careful scrutiny of the evidence recovered. If on such scrutiny the court is satisfied regarding the identity of the articles recovered, the fact of irregularity in conducting the search will be no bar to conviction. But if there is reasonable doubt about recovery itself, it shall lead to acquittal.

In Obey Chukwundindu and another v. Commissioner of Police,[123] the appellant was convicted of the theft of goods belonging to the Nigerian Railway Corporation. The police officer who conducted the search of the appellant's compound and recovered the goods did not apparently invite witnesses as required by section 78(1) of the Criminal Procedure Code. The appellant had argued that the goods belonged to him.

The High Court of the Northern Region allowed the appeal on the ground that doubts had arisen as to what was actually found during the search.

3. Under Indian Law

It may be of interest to note that the Indian Law on the point also follows the common law. For instance, it was declared in the case of Ali Ahmad Khan:[124] "Any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction."

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123. Supra, n. 95.

124. A.I.R. (1924) Allahabad 214.

Also, in Baldeo v. Emperor,[125] where the appellant had contended in his appeal that his conviction by the trial court was wrong because the property involved was found in a search which had been conducted in an irregular manner, the Calcutta High Court refused to interfere and declared: ".... Even if the search was irregularly conducted, that would merely go to the weight which the jury would attach to the finding of the property in question and would not make such property inadmissible in evidence ...."

However, where the person of an accused is searched without his consent and evidence tending to strengthen the case of the prosecution is found on him, the Indian courts will normally reject such evidence. This happened in Bhondar v. Emperor,[126] a case in which a fifteen year old boy was charged with rape. A medical officer, who had medically examined the boy without the boy's prior consent testified that the examination of the boy revealed an injury which must have been sustained by him when penetrating with difficulty the vagina of a girl. The boy was convicted by the trial court. He appealed against his conviction.

Allowing the appeal, the Calcutta High Court declared: ".... Any such examination without the consent of the accused would amount to an assault, and I am quite satisfied that

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125. A.I.R. (1933) Calcutta 187

126. Supra, n. 78.

the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence of this kind....."[127]

4. Under American Law

Under the American Law, the facts discovered in consequence of an unlawful search are inadmissible in evidence. This is by virtue of the application of the exclusionary rule. The rule has its origins in the Fourth Amendment to the American Constitution and is regarded as a means of enforcing the citizen's rights against illegal search and seizure. Traditionally, the rule has been justified on two grounds:

(i) To end the conflict over the extent of the government's power to search and seize; and

(ii) To guard against the abuse of the warrant requirement.[121] Expounding the rule, C.J. Burger said in his dissenting opinion in Brewer v. Williams:[128]

> "In its Fourth Amendment context.... the exclusionary rule is in no sense a personal constitutional right, but a judicially conceived remedial device designed to safeguard and effectuate guaranteed legal rights generally.... We have repeatedly emphasized that deterrence of unconstitutional or otherwise unlawful police conduct is the only valid justification for excluding reliable and probative evidence from the criminal fact finding process...."

This rule of exclusion was first propounded by the American Supreme Court in the leading case of Weeks v. United States.[129] In this case, it was for the first time

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127. See generally, Oaks, "Studying the Exclusionary rule in search and seizure, (1970), U. Chi. L. Rev., Vol.37, 665.

128. 430 U.S. 387 (1977); 97 S. Ct. 1232.

129. 131 U.S. 383, 34 S. Ct. 341 (1914).

declared that evidence illegally seized by Federal officers must not be admitted in Federal prosecutions.

The facts of the case were that the accused was arrested at his place of work by a police officer acting without warrant. Other police officers had gone to the house of the accused. They were told by a neighbour where the key to the house was kept. Finding the key, they opened and entered the house without having any warrant in their possession. They searched the house and took possession of various papers and articles found therein. The evidence so obtained from the house was used by the police in the prosecution of the accused.

The accused petitioned the lower court for the return of the items seized. But his petition was rejected. Thereupon he appealed to the American Supreme Court contending that the search was unlawful and violated his rights under the Fourth and Fifth Amendments of the American Constitution.

Allowing the appeal, the Supreme Court declared that the maxim "everyman's house is his castle" is a principle contained in the Fourth Amendment of the Constitution of the United States which prohibits unreasonable search and seizure; and, because the search in the present case was in clear violation of the defendant's rights under the Constitution, the documents ought to have been returned to the appellant.

Later, in Wolf v. Colorado[130] the Supreme Court declared that the prohibition against unreasonable search and seizure contained in the Fourth Amendment also applied to the constituent States as part of the "due process" which was guaranteed by the Fourteenth Amendment. But it also declared that State courts were free, if they so chose, to admit evidence obtained even by unlawful search.

Subsequently, the Supreme Court finally extended the application of the exclusionary rule to State prosecution in 1961 by declaring in Mapp v. Ohio,[131] that a conviction in a State prosecution based on evidence obtained by unreasonable search and seizure was a violation of the due process of law guaranteed by the Fourteenth Amendment.

In this case, three police officers went to the petitioner's house looking for a person in connection with a recent bombing. On her refusal to allow them in for lack of warrant, they broke open the back door and tried to enter the house. When the petitioner attempted to resist them, they handcuffed her and took her to the room. Thereafter, they searched a dresser, a chest of drawers, a closet and some suitcases, looking into a photo album and the petitioner's personal papers. Ultimately, they left the house taking with them some photographs and pamphlets alleged to be pornographic. She was prosecuted and convicted for knowingly being

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130. 69 S. Ct. 1359

131. 367 U.S. 643; (1961) 81 S. Ct. 1684 (1961).

in possession of obscene, lewd, or lascivious books and pictures. She petitioned against her conviction.

Allowing the petition, The Supreme Court declared that in view of the citizen's constitutional right to enjoy privacy free from unreasonable state intrusion, all evidence obtained by search and seizure in violation of the Constitution is inadmissible even in State trials. The Court said: "We hold that all evidence obtained by searches and seizures in violation of the Constitution is by that same authority inadmissible...."[132]

For the exclusionary rule to apply, the search or seizure must be unreasonable. And the question whether a search is reasonable or not is normally resolved on the facts and circumstances of each case. This means that the test of reasonableness is not fixed by rules, but that each case is decided on its own facts. In determining the issue, the court will have regard to the existence of a probable cause for the search, the method employed, and the scope of the seizure. So, when a stomach pump was employed to extract evidence from the stomach of a suspect in Antonio Rochin v. California,[133] the Court rejected the evidence taking the view that the search was unreasonable and shocked their conscience.

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132. Id. at 655

133. Supra, n. 81

At this juncture, it may be pertinent to point out that although the exclusionary rule still firmly remains part of the law in the United States, it cannot claim to enjoy a universal acceptability amongst commentators on the subject. For instance, the rule has been criticised as constituting a "legal stumbling block tossed in front of policemen seeking to do their duty."[134]

Mr. Justice Jackson also made an interesting comment on the exclusionary rule in Irvine v. California[135] when he said: "It protects one against whom incriminatory evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

On the other hand, the exclusionary rule has equally been hailed and resolutely defended by other commentators. Thus, in an eloquent defence of the rule, Paulsen[136] has said: "When the prosecutor takes evidence gained by lawless enforment of the law and places it before a court, that court by accepting the offer of proof, becomes inevitably drawn into the lawlessness... The exclusionary rule dissociates the court from any police policy of systematic violation of the law."

Again, in another fervent defence of the rule, Mr. Justice Brandies, dissenting in Olmstead v. United States,[137] said:

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134. Lewis and Peoples (1978), Supreme Court and the Criminal Process, 220.

135. 347 U.S. 128, (1954)

136. Paulsen, "The Exclusionary Rule and Misconduct by the Police," (1962), Police Power and Individual Freedom,

137. 277 U.S.438, 485 (1928).

> If the Government becomes lawbreaker, it breeds contempt for law; .... it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution....

No doubt, it may be said that as the aim of the rule excluding the use of evidence illegally obtained is to deter law enforcement officers from violating individual rights and reduce the social danger of police excesses, it is morally correct and appropriate to a free society, and its enforcement is a logical consequence to the constitutional guarantees of the privacy of citizens. Yet, it is respectfully submitted that the application of the rule may result in unduly affording greater protection to individual rights at the expense of societal well being. Again, in developing countries, like Nigeria, where the level of education and training of police personnel and other law enforcement agents is low, provisions or requirements of law may not always be fully grasped/ or appreciated even by the well-meaning and scrupulous policemen. All this suggests that at this point of our development the relevant common law rule on the subject, as enunciated by the Privy Council in Kuruma v. R [138] and adopted by the Federal Supreme Court in Musa Sadau & another v. The State, [139] is more rational and practicable to us than the exclusionary rule on same. The exclusionary rule is, in my view, a luxury which we can hardly afford at present.

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138. Supra, n. 120

139. Supra, n. 97.

CHAPTER V

REMEDIES FOR VICTIM OF UNLAWFUL SEARCH AND SEIZURE

The question whether the victim of unlawful search and seizure has any remedy becomes important in view of the fact that in Nigeria all relevant evidence is generally admissible in a trial or inquiry even if it has been obtained illegally.

In this chapter, we may consider some of the preventive measures available to a person who apprehends that the might become a victim of an impending unlawful search; and he remedial measures available to a victim of an actual unlawful search.

A. PREVENTIVE MEASURES AVAILABLE BEFORE SEARCH

1. The exercise of the right of resistance

In law, a police officer is empowered to invade the person or property of a citizen only if such police officer is acting in the execution of his lawful duty. And while a police officer is engaged in the performance of his lawful functions any person who prevents him from doing so may be guilty of the offence of obstructing a public servant in the discharge of his functions,[140] or applying criminal force or assault on a public servant,[141] and so on.

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140. Section 148 of the Penal Code

141. Section 265 of the Penal Code.

However, if the conduct or action of the police officer is not justified by law, he becomes a trespasser who can be legally resisted by force if he tries to conduct any search or seizure. A classic example is the case of Sarkin Kinkiba Tsoho Ladan v. Zaria Native Authority,[142] where the appellant forcibly resisted a police officer who had entered his house without his consent in order to arrest the appellant's son on a suspicion of being involved in a riot. The officer had no warrant in his possession at the material time and the suspicion itself was not founded on reasonable grounds. The appellant was subsequently tried and convicted under section 112 of the Penal Code for assaulting and obstructing a public servant in the discharge of his duty. He appealed against his conviction.

The appeal was allowed on the ground that in the circumstances of the case the police officer could not be said to be discharging his duty, and this made his entry into the appellant's house a trespass which justified the appellant in resisting him by force.

This principle applies equally to cases of search and seizure. This means that whenever a police officer or any other person attempts to search an individual's person or private premises otherwise than in the manner authorized by law, such officer or person becomes a trespasser and

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142. Supra, n. 87.

the intended victim or actual victim of such search may legally resist him by force.[143] Thus, it was held in R. v. Flight Lieutenant A.R. Quinn [144] that a police officer whom without a warrant to search, but with the consent of the occupiers of a premises, enters the premises to investigate an alleged offence cannot remain there after the occupiers have withdrawn such consent; and that, if he decides to remain on the premises thereafter, he becomes a trespasser and the occupiers may justifiably resist him by force.

Also, in R. v. Waterfield and another,[145] the defendants had smashed a car into a wall. Two policemen wanted to keep the car as evidence of the defendant's dangerous driving and they tried to prevent the defendants from driving it away. The driver, who had not been charged, drove the car at one of the policemen and then sped away. He was convicted for assaulting a policeman in the execution of his duty.

On appeal, the conviction was quashed on the grounds that in the circumstances of the case the police had had no duty to detain the property found in a public place so that it could be used in evidence. In arriving at its decision, the appeal court took a particular note of the fact that the action of the policemen was not preceded by either the arrest or charge of either of the two defendants.

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143. (1965) Criminal Law Review, 23 - 27

144. Supra, n. 83

145. Supra, n. 40.

2. Petition for injunction

The second option open to the intended victim is to approach a court for an injunction to forestall the impending search or to restrain it where it is already underway.

In the Rossminster case,[146] there was a suspicion that the Rossminster Group of companies and those closely connected with the Group had been perpetrating tax frauds on a large scale. As a result, search warrants were obtained by officers of the Inland Revenue under the English Finance Act of 1976 authorizing them to search all premises in the occupation of the companies and the private houses of persons connected with them. When the searches were launched, the householders, without making any attempt to resist the searches, applied to the court for injunctions to restrain the searches arguing that the warrants did not specify the offence or offences they were suspected to have committed as being fraud on the tax. The question then arose as to whether the warrants were valid or not. The lower court granted the applications.

The Court of Appeal upheld the decision of the lower court to grant injunctions restraining the officers of the Inland Revenue from trespassing on the premises of the petitioners and went on to grant writs of certiorari to quash the warrants on the ground that they were invalid for want of particularity.

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146. Supra, n. 4.

B. REMEDIAL MEASURES AVAILABLE AFTER THE SEARCH

If a person was unable to take advantage of the aforesaid preventive options against the impending unlawful search, he may still obtain redress after the unlawful search has actually taken place. Such redress may be sought either through judicial or through administrative remedies.

1. JUDICIAL REMEDIES

These remedies may take the form of: (a) a civil action, or (b) a criminal prosecution.

(a) CIVIL ACTION

A number of options of civil nature are open to persons who suffer an unlawful invasion of their person or property by way of search or seizure. They are as follows:

(i) An action for trespass

Depending on the nature of the invasion, an action may lie for a claim of damages for trespass to land or chattel. Such an action is maintainable even where the plaintiff did not suffer any special damage. In other words, the mere entry by the police into the private premises of a citizen without lawful authority, or making irregular seizure of property after even gaining a lawful entry into the premises is enough to sustain an action for trespass.[147]

Thus, in Peters v. Shaw,[148] the defendant, a police officer was one of a number of constables looking for persons alleged

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147. Supra, n. 145 at 429 - 430.

148. Reported in the Times, May 6, 1965.

to have committed a felony. He had forcibly entered the plaintiff's caravan in search for the suspects. At the time of the entry he had in his possession no warrant to search the caravan. As a result, the plaintiff brought an action for trespass against him and succeeded. In the course of his summing up, the trial Judge directed the jury that a trespass, for this purpose, was committed by a person who entered the private property of another against that person's will and without his consent.

But in Elias v. Pasmore & Others,[149] the entry into the plaintiff's house was lawful because it was made in pursuance of a warrant of arrest. Nonetheless, the constables were held liable for trespass when they took away property and documents totally irrelevant to the charge in question and which did not corstitute evidence of the commission of some other offence.

However, according to the decision in Chic Fashions (West Wales) Limited v. Jones,[150] an action for trespass cannot succeed where there was seizure of goods reasonably believed to be stolen but which later turned out to be not stolen. This is because the lawfulness of the conduct of the searcher is judged at the time of the search and not by that happens or surfaces thereafter.

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149. Supra, n. 22

150. Supra, n. 27

(ii) An action for assault or battery

If the threat of force was made or actually applied on the person of the plaintiff in the course of conducting an unlawful search, damages for assault or battery, as the case may be, may be granted. The difference between these two torts is that while assault requires a mere threat to apply force, battery involves the actual application of force. Force, in this context, means an unpermitted contact, however slight, with the body of the plaintiff. The application of force should be direct and can either be intentional or negligent.

However, battery may be complete even though there has been no violent or severe beating. And in order to succeed in an action for assault or battery, there is no burden on the plaintiff to prove that he has suffered some damage.

(iii) Petition for restoration

The owner of the property taken away by the police may also petition the court to order the return of such property. Such an order may be made where what has been taken away by the police has no evidential value in relation to the charge which they are investigating. This is also because the police are obliged not to keep the article for any longer than is reasonably necessary to complete their investigations or to preserve the article for evidence.

If a copy of a document taken by the police would suffice, the copy should be made and the original be returned to the owner. Furthermore, as soon as the case is over, or

if it is decided not to go on with it, the article should be returned to its lawful owner.[151]

In Nigeria, the provisions of the Criminal Procedure Code and the Criminal Procedure Act give the courts wide powers with regard to the disposal of property produced before them as part of an investigation or inquiry. Section 86 of the Criminal Procedure Code, for instance, empowers a Court to impound property produced before it under the provisions of the Code.

(b) CRIMINAL PROSECUTION

Where in the course of conducting a lawful search, the searcher (a police officer or some other person) threatens the use of, or actually uses excessive force, the searcher could be prosecuted under section 265 of the Penal Code for the offence of assault or criminal force.

In the Southern States of Nigeria, the use of excessive force in conducting a search may similarly amount to an offence of assault or criminal force punishable under section 298 or 351 of the Criminal Code respectively. In such cases, the prosecution may be initiated privately by the victim himself. However, it is submitted that the deterrent effect of these provisions would be better enhanced if the prosecution is conducted by the State.

2. ADMINISTRATIVE REMEDY

Any person who is subjected to a wrongful search by a police officer may lodge a complaint against such conduct

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151. See Ghani v. Jones, supra, n. 28

with the higher police authorities through the public relations offices of the police Department. If the complaint is properly pursued it may lead to internal disciplinary action being taken against the erring police officer.

C. EFFECT OF DECREE NO. 13 ON REMEDIES

Having discussed the options open to persons who have been subjected to wrongful searches or seizures, we may now proceed to consider the effect of the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1984[152] on these remedial options.

The Decree, which came into force on 31 December, 1983 categorically bars the institution of any civil action against any person acting or purporting to act under a Decree or Edict. It reads: "No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict.[153] This means that even if such person has acted wrongfully he is immune from any civil action.

As regards the option of criminal prosecution, the Decree again seems to raise another obstacle. It bars the courts from inquiring into the question whether the action of any individual acting under a Decree or Edict contravenes any of the fundamental provisions enshrined in the Constitution

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152. Decree No. 13

153. Section 2(b)(i) of the Decree.

of the Federal Republic of Nigeria, 1979. Further, it specifically states that no provision of the Constitution shall apply in respect of any such question. This means that no criminal prosecution can be launched against a person acting or purporting to act under a Decree or Edict.[154]

The options of civil and criminal prosecution having thus been barred to the victim of unlawful search and seizure what still remains technically open to him is the administrative option. But, it is respectfully submitted that even this option can hardly be of much practical value against the actions of those very officers whom the Decree seeks to insulate against civil and criminal proceedings.

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154. Section 2(b)(ii) of the Decree.

CHAPTER VI

CONCLUSION AND SUGGESTIONS

A. CONCLUSION

Finding an acceptable equilibrium between the right of the citizen to be protected from unlawful interference with his person and property and the overriding interest of the State in suppressing crime, which provides the raison d'etre of search and seizure, is a problem that is not likely to be solved so easily in Nigeria. The difficulty of the problem is such that even Britain and the United States, which have been endeavouring to solve this very problem for about three centuries now, are yet to achieve complete success. Admittedly, the law is relatively more developed in the United States than in the other common law countries. This achievement is attributable mainly to the positive effect of the application of the exclusionary rule which, if successfully invoked in a criminal case, invariably leads to the collapse of the prosecution's case and the acquittal of the accused person. And, because of this important consequence, people in the United States are encouraged to litigate all suspected cases of unreasonable search and seizure.

It is submitted that generally the main difficulty militating against the rapid development of the law of search and seizure is that cases arising in this area are,

more often than not, basically decided on their own special facts and circumstances. The result, therefore, is that earlier decisions can hardly be of valuable precedence for future cases.

However, in the light of the preceding discussion on the subject, we are now in a position to identify the major shortcomings in the law relating to search and seizure in the Northern States of Nigeria and the problems in its actual application, and to offer some suggestions for substantially improving the law and minimising its misuse and abuse.

B. SHORTCOMINGS AND PROBLEMS

1. Shortcomings:

The provisions of search and seizure contained in the Criminal Procedure Code seem to suffer from the following shortcomings:

(i) Section 77(2) of the Criminal Procedure Code[155] really three sub-sections in one, and that makes it very cumbersome and unnecessarily lengthy.

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155. It states: "Upon complaint made on oath to a court of the abduction for any unlawful purpose or of the unlawful detention of any person the court may after inquiry if any, as it thinks necessary make an order for the production of that person or for the immediate restoration of that person to his liberty or if he is under fourteen years of age for his immediate restoration to his parent guardian or other person having lawful charge of him and may compel compliance with an order made under this subsection using such force as may be necessary and upon the production of the person who is the subject of the order the court shall make such order as seems proper."

(ii) The requirement mentioned in section 78(1) of the Criminal Procedure Code that the search should be made in the presence of "two respectable inhabitants of the neighbourhood," may cause some difficulties for the reason that it may not always be easy to find the witnesses contemplated by the provision.

(iii) The Criminal Procedure Code contains no provision requiring that members of the search party (i.e., the police officers conducting the search and the witnesses summoned to be present at the search) should, before entering the premises to be searched, allow themselves to be searched by the occupants thereof so that the possibility of incriminating things being planted in the premises by anyone of them[156] may be excluded.

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156. Such an allegation was made by the accused in the case of Musa Sadau and Another v. The State supra, n. 103.

2. Problems: The following two problems are most outstanding in connection with search and seizure.

(i) The police do not return the items, more especially money, taken from the possession of arrested persons following their search.

(ii) People are shy of bringing to courts cases involving excesses or abuses perpetrated by the police during searches. This state of affairs seems to be the result of a combination of various factors:

First, a belief among the poor and illiterate people, particularly in the Northern part of the country, who are ignorant about their legal rights and who believe that the police are the agent of the State and their actions cannot be challenged by ordinary citizens.

Secondly, because search and seizure mostly takes place in the course of police investigations of crimes, the suspects, who may not always be completely innocent, start believing that whatever the police are doing is sanctioned by law.

Thirdly, even those people who are better educated about their own rights and the powers of the police may still be disinclined to go to the courts either because of fear of police retribution, or because of the uncertainty of the outcome of court cases, or the smallness of the compensation that may be recovered.

C. SUGGESTIONS:

1. Legislative

As pointed out earlier, the wordings of some of the provisions of the Criminal Procedure Code relating to search and seizure are so wide and lengthy that it is not easy to define their precise scope. There is the need, therefore, for an overall review of all relevant provisions of the Code on the subject with a view to introducing amendments, where necessary, so as to attain maximum clarity and precision. In particular the following points deserve consideration.

(i) In order to provide for better comprehension, section 77(2) may be re-drafted into two separate provisions as follows:

> "(2) Upon complaint made on oath to a court of the abduction for any unlawful purpose or of the unlawful detention of any person the court may after such inquiry, if any, as it thinks necessary make an order for the production of that person or for the immediate restoration of that person to his liberty or if he is under fourteen years of age for his immediate restoration to his parent, guardian or other person having lawful charge of him."

The latter part of the sub-section could be re-written into sub-section (3) as follows:

> "(3) If the person served with an order made under the preceding sub-section fails to comply with the order the court may compel compliance with the order using such force as may be necessary and, upon the production of the person who is the subject of the order, the court shall make such order as seems proper."

(ii) In its present form, section 44 of the Criminal Procedure Code authorizes the police upon arresting a person to take everything in his possession except his wearing

apparel. It may be better to amend the section so as to limit the police power of seizure upon arrest to weapons and other items which may be useful as evidence relating to the offence under investigation; and to give the arrested individual the right to hand over the remaining articles in his possession to his personal trustee. Such an amendment would go a long way in meeting frequent complaints that the police do not return valuable articles taken from the possession of arrested of persons at the time of their arrest.

(iii) The stipulation as regards having "two respectable inhabitants of the neighbourhood" to witness a search as contained in section 78(1) of the Criminal Procedure Code may be widened to require that a search be conducted either in the presence of "two respectable inhabitants of the neighbourhood or any two respectable persons if no such inhabitants of the neighbourhood are available or are willing to be witnesses to the search."

It may be interesting to note that the Indian Criminal Procedure Code provides that searches should be conducted in the presence of "two or more independent and respectable inhabitants of the locality.... or of any other locality if no such inhabitants of the said locality is available or is willing to be a witness to the search."[157]

(iv) The Federal Government or the State Governments should enact a law under which persons who suffer any unlawful violation of their privacies through the process of search and seizure may be able to recover through administrative proceedings compensation from the (police authorities or any other) authority ordering the search.

It may be mentioned that since 1964 the Chief Constable in England has been made vicariously liable for torts committed against others by constables under his direction and control,[158] and damages and costs awarded against him are paid out of a fund known as "Police Fund."

(v) At present, police officers in Nigeria routinely submit themselves to an occupier of any premises for a search of their persons whenever they are to conduct a search in such premises. However, there is nothing, either by way of a procedural rule or a rule of practice, that obliges members of a search party to submit to a search of their persons prior to their entry into the premises to be searched. In order to reassure persons whose premises are to be searched that no incriminating material would be planted against them by the search party, there is the need to enact a provision authorizing the occupant of the premises to be searched to search the person of every member of the search party (including the witnesses) before they get into the premises to be searched. Such provision will obviate the possibility of implantation of incriminating articles on the premises. An allegation of such implantation was made by the appellant in Musa Sadau v. The State [159] though it was rejected for want of evidence on the point. If this suggestion is accepted, it would leave no reason for such allegations. It is

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158. Police Act of 1964, S. 48.

159. Supra, n.103

noteworthy that in India there exists a rule-of practice which requires that members of a search party must first be searched by the occupant of the premises to be searched before they enter such premises.[160]

2. The Courts:

(i) Although Nigerian Law makes admissible the evidence obtained through unlawful search and seizure, the courts have a discretion to exclude such evidence in criminal cases where it will operate unfairly against the accused. In practice, however, the judges have shown a tendency to lean in favour of the police and to refuse to exclude such evidence,[161] unless it has been shown to be extracted by force from the accused.[162] In order to discourage the use of illegal means in procuring evidence, our judges would do well to widen the grounds upon which evidence unlawfully obtained may be rejected. Our courts may be guided, for instance, by the position in England where evidence obtained by the police acting repressively or evidence obtained by way of trick or false representation is rejected by the courts.

(ii) One of the factors that discourage the victims of illegal search and seizure from resorting to civil action is the smallness of compensation that is awarded to successful plaintiffs. Therefore, the courts may do well to award sizeable compensation to the victims of police highhandedness during searches and seizures so that the deterrent effect of civil actions may be felt by those police officers who trample upon human rights in their overzealousness.

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160. Sarkar, supra, n. 90 at 112

161. Musa Sadau & One another v. The State, supra, n. 103. See also Obey Chukwundindu, supra, n. 95; Edene Ugama v. O. supra, n. 76.

162. Chimikpu v. Commissioner of Police, supra, n. 74.

(iii) The courts may also recommend, in appropriate cases, that disciplinary action be taken by the police authorities against any officer who is guilty of conductin search and seizure in an unlawful or high-handed manner. This will go a long way in reducing cases of unwarranted general searches or use of third degree methods in relatio to searches

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